# 16 C.J.S. Constitutional Law I IV Refs.

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## Research References

**A.L.R. Library**

A.L.R. Index, Constitutional Law
A.L.R. Index, Delegation of Powers
A.L.R. Index, Separation of Powers
West's A.L.R. Digest, Constitutional Law 2330 to 2394, 2400 to 2413, 2415(1) to 2415(5), 2418 to 2420, 2422(1) to 2422(3), 2423, 2424(1) to 2424(5), 2425(3), 2426, 2427(1), 2429, 2430(1) to 2430(5), 2431 to 2440, 2442 to 2446



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## Research References

**A.L.R. Library**

A.L.R. Index, Constitutional Law
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# 16 C.J.S. Constitutional Law § 272

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

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**A. Separation of Powers**

## § 272. Separation of powers, generally

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**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2330 to 2333

**The separation-of-powers doctrine arises out of the constitutional distribution of the government's authority into three branches of government and is fundamental to our constitutional form of government.**

The separation-of-powers doctrine arises out of the constitutional distribution of the government's authority into three branches of government.[1] In addition to provision therefor in the United States Constitution,[2] the separation of governmental powers into legislative, executive, and judicial is provided for in practically all the American state constitutions, and such provisions, in theory, effect an absolute separation of these departments.[3] The concept of separation-of-powers is fundamental to our constitutional form of government,[4] and even where not expressly enunciated in the constitution, it is recognized as an inherent and integral element of the republican form of government[5] and is inferred from the organizing principles underlying the constitution itself.[6]

***Specific powers.***

The doctrine of separation-of-powers recognizes three separate branches of government: the executive, the legislative, and the judicial, each with its own powers and responsibilities.[7] The constitution specifically delineates the power belonging to each

branch of government; the legislature enacts laws, the executive branch is tasked with carrying out and enforcing those laws, and judicial power is the authority to hear and determine justiciable controversies.[8]

## CUMULATIVE SUPPLEMENT

**Cases:**

The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty, and their solution to governmental power and its perils was simple: divide it; at the highest level, they split the atom of sovereignty itself into one Federal Government and the States, and they then divided the powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial. U.S. Const. art. 2, § 1, cl. 1; U.S. Const. Art. 2, § 3. Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020).

Separation of powers concerns were raised by congressional committees' issuance of subpoenas to banks and an accounting firm, seeking personal financial and tax records for the President, who did not invoke executive privilege, and financial and tax records for the President's family members and the family's businesses entities; subpoenas did not represent a run-of-the-mill legislative effort, but rather a clash between rival branches of government over records of intense political interest for all involved, and the interbranch conflict did not vanish simply because the subpoenas sought personal papers or because the President, in challenging subpoenas issued to third parties, sued in his personal capacity. Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020).

Appropriations Clause constitutes separation-of-powers limitation that litigants can invoke to challenge actions that cause justiciable injuries. U.S. Const. art. 1, § 9, cl. 7. Sierra Club v. Trump, 977 F.3d 853 (9th Cir. 2020).

The doctrine of separation of powers requires not an absolute division of power but a cooperative accommodation among the three branches. N.J.S.A. Const. Art. 3, par. 1. State v. Buckner, 121 A.3d 290 (N.J. 2015).

**[END OF SUPPLEMENT]**



Footnotes

1 Ohio—State v. Bodyke, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753 (2010).
Wash.—Port of Seattle v. Pollution Control Hearings Bd., 151 Wash. 2d 568, 90 P.3d 659 (2004).

2 U.S.—Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010).

3 Neb.—Ramsey v. Gage County, 153 Neb. 24, 43 N.W.2d 593 (1950).
N.D.—State v. Kromarek, 78 N.D. 769, 52 N.W.2d 713 (1952).
Wash.—State v. Rice, 174 Wash. 2d 884, 279 P.3d 849 (2012).
**Cornerstone of government**
N.C.—State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).

4 Ariz.—Ahearn v. Bailey, 104 Ariz. 250, 451 P.2d 30 (1969).
W. Va.—State v. Bostic, 229 W. Va. 513, 729 S.E.2d 835 (2012).
**Basic principle upon which government is founded**
Ark.—Arkansas State Bd. of Election Com'rs v. Pulaski County Election Com'n, 2014 Ark. 236, 437 S.W.3d 80 (2014).
**Doctrine firmly entrenched**
Cal.—People v. Johnson, 183 Cal. App. 4th 253, 107 Cal. Rptr. 3d 228 (3d Dist. 2010).

5 Kan.—Hays v. Ruther, 298 Kan. 402, 313 P.3d 782 (2013).

6 U.S.—Kwai Chiu Yuen v. Immigration and Naturalization Service, 406 F.2d 499 (9th Cir. 1969).
Kan.—Leek v. Theis, 217 Kan. 784, 539 P.2d 304 (1975).
Ohio—State v. Bodyke, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753 (2010).
Wis.—State v. Chvala, 2004 WI App 53, 271 Wis. 2d 115, 678 N.W.2d 880 (Ct. App. 2004), decision aff'd, 2005 WI 30, 279 Wis. 2d 216, 693 N.W.2d 747 (2005).

7 Fla.—Whiley v. Scott, 79 So. 3d 702 (Fla. 2011).

8 Nev.—N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs, 310 P.3d 583, 129 Nev. Adv. Op. No. 72 (Nev. 2013).
S.C.—South Carolina Public Interest Foundation v. South Carolina Transp. Infrastructure Bank, 403 S.C. 640, 744 S.E.2d 521 (2013).

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**A. Separation of Powers**

## § 273. Purposes of separation-of-powers doctrine

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2331

**The primary purpose of the separation-of-powers doctrine is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government, thereby protecting against arbitrary oppressive acts and tyranny.**

The primary purpose of the separation-of-powers doctrine is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government.[1] In other words, the purpose is to protect the governed from arbitrary oppressive acts on the part of those in political authority[2] and to avoid the tyranny of any branch of government being supreme in all fields.[3] Essentially, the purpose of the separation-of-powers doctrine is to rid each separate department of government from any influence or control by the other department.[4]

***Protection of individual.***

While the constitutional separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others, yet the dynamic between and among the branches is not the only object of the constitution's concern, the structural principles secured by the separation-of-powers protect the individual as well.[5]

  

**CUMULATIVE SUPPLEMENT**

**Cases:**

Aside from the sole exception of the Presidency, the Constitution scrupulously avoids concentrating power in the hands of any single individual. U.S. Const. art. 2, § 1, cl. 1; U.S. Const. Art. 2, § 3. Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020).

New Jersey's constitutional provision for separation of powers was designed to maintain the balance between the three branches of government, preserve their respective independence and integrity, and prevent the concentration of unchecked power in the hands of any one branch. N.J. Const. art. 3, § 1. State v. A.T.C., 239 N.J. 450, 217 A.3d 1158 (2019).

**[END OF SUPPLEMENT]**



Footnotes

1 Conn.—Stolberg v. Caldwell, 175 Conn. 586, 402 A.2d 763 (1978).
Ill.—In re Derrico G., 2014 IL 114463, 383 Ill. Dec. 679, 15 N.E.3d 457 (Ill. 2014).
N.M.—State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768 (1998).
S.C.—Hampton v. Haley, 403 S.C. 395, 743 S.E.2d 258 (2013).
Wis.—State v. Washington, 83 Wis. 2d 808, 266 N.W.2d 597 (1978).
**Concentration of power avoided**
Governments, both state and federal, are divided into three departments, each of which is given the powers and functions appropriate to it; thus, a dangerous concentration of power is avoided, and the respective powers are assigned to the department best fitted to exercise them.
Kan.—Gannon v. State, 298 Kan. 1107, 319 P.3d 1196, 302 Ed. Law Rep. 377 (2014).

2 N.D.—State v. Kromarek, 78 N.D. 769, 52 N.W.2d 713 (1952).
**Securing rights**
The framers of the United States Constitution crafted the federal system of government so that the people's rights would be secured by the division of power.
U.S.—U.S. v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658, 144 Ed. Law Rep. 28 (2000).

3 Kan.—Gannon v. State, 298 Kan. 1107, 319 P.3d 1196, 302 Ed. Law Rep. 377 (2014).
Minn.—Holmberg v. Holmberg, 588 N.W.2d 720 (Minn. 1999).
N.H.—Fischer v. Superintendent, Strafford County House of Corrections, 163 N.H. 515, 44 A.3d 493 (2012).
Vt.—Hunter v. State, 177 Vt. 339, 2004 VT 108, 865 A.2d 381 (2004).

4 Ind.—Berry v. Crawford, 990 N.E.2d 410 (Ind. 2013).

5 U.S.—Bond v. U.S., 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011).
**Serves to safeguard individual liberty**
U.S.—N.L.R.B. v. Noel Canning, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014).
**Overall scheme to protect individual rights**
The separation-of-powers doctrine protects one branch against the overreaching of any other branch and is part of an overall constitutional scheme to protect individual rights.
Ariz.—Cook v. State, 230 Ariz. 185, 281 P.3d 1053 (Ct. App. Div. 1 2012).

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## § 274. Protection from encroachment by other branches

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2332

**Constitutional government in the United States is distinguished by the care that has been exercised in committing the legislative, executive, and judicial functions to separate departments and in forbidding any encroachment by one department on another in exercise of the authority so delegated.**

Constitutional government in the United States is distinguished by the care that has been exercised in committing the legislative, executive, and judicial functions to separate departments and in forbidding any encroachment by one department on another in exercise of the authority so delegated.[1] The constitutional mandate requires that the three branches remain independent,[2] separate, and distinct[3] and that such separation be strictly enforced.[4]

The United States Constitution is designed to require sharing of the sovereign power by each of the three coordinate branches of government,[5] and the Constitution's division of power among the three branches is violated where one branch invades the territory of another regardless of whether the encroached-upon branch approves the encroachment.[6] State constitutions as well are designed to protect each of the three branches from encroachment by the others.[7] Underlying any encroachment of power by one branch of government, in violation of the constitutional separation of powers, is the paramount concern that such action will impermissibly foster dominance and expansion of power.[8]

It is thus an established and fundamental principle of constitutional law that one department cannot interfere with, or encroach on, or exercise the powers of, either of the other departments,[9] in the absence of an express provision therefor.[10] If any department of government acts beyond the bounds of its authority, such action is without jurisdiction, unconstitutional, and void.[11]

## CUMULATIVE SUPPLEMENT

**Cases:**

The powers of state government are legislative, executive, and judicial, and persons charged with the exercise of one power may not exercise either of the others except as permitted by the California Constitution. Cal. Const. art. 3, § 3. People v. Alaybue, 51 Cal. App. 5th 207, 264 Cal. Rptr. 3d 876 (6th Dist. 2020).

## [END OF SUPPLEMENT]



Footnotes

1 U.S.—U.S. v. Green, 654 F.3d 637 (6th Cir. 2011).
Ind.—Trueblood v. State, 790 N.E.2d 97 (Ind. 2003).
Neb.—In re Interest of Constance G., 254 Neb. 96, 575 N.W.2d 133 (1998).
Pa.—Friends of Pennsylvania Leadership Charter School v. Chester County Bd. of Assessment Appeals, 101 A.3d 66, 310 Ed. Law Rep. 1007 (Pa. 2014).
Wash.—State v. DiLuzio, 121 Wash. App. 822, 90 P.3d 1141 (Div. 3 2004).

2 Utah—In re Schwenke, 2004 UT 17, 89 P.3d 117 (Utah 2004).

3 Idaho—State v. Moore, 150 Idaho 17, 244 P.3d 161 (2010).
Tenn.—Walker v. Bradley County Government, 447 S.W.3d 877 (Tenn. Ct. App. 2014), appeal denied, (Sept. 19, 2014).
W. Va.—State ex rel. Holmes v. Clawges, 226 W. Va. 479, 702 S.E.2d 611 (2010).

4 Ga.—Dion v. Y.S.G. Enterprises, Inc., 296 Ga. 185, 766 S.E.2d 48 (2014).
W. Va.—State ex rel. State Bldg. Commission v. Bailey, 151 W. Va. 79, 150 S.E.2d 449 (1966).
**Election practices**
The authority of Congress over federal election practices is not of such a wholly different nature from other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions stemming from the separation of powers.
U.S.—Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

5 U.S.—U.S. v. U.S. Dist. Court for Eastern Dist. of Mich., Southern Div., 444 F.2d 651 (6th Cir. 1971), judgment aff'd, 407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972).

6 U.S.—New York v. U.S., 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992).

7 Ill.—Martinez v. Department of Public Aid, 348 Ill. App. 3d 788, 284 Ill. Dec. 818, 810 N.E.2d 608 (1st Dist. 2004).
Miss.—Jones v. City of Ridgeland, 48 So. 3d 530 (Miss. 2010).
N.H.—Opinion of the Justices, 118 N.H. 582, 392 A.2d 125 (1978).
Ohio—In re Estate of Robertson, 159 Ohio App. 3d 297, 2004-Ohio-6509, 823 N.E.2d 904 (7th Dist. Mahoning County 2004).

8 W. Va.—State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee, 213 W. Va. 255, 580 S.E.2d 869 (2003).
As to the purposes of the doctrine, see § 273.

9 U.S.—Miller v. French, 530 U.S. 327, 120 S. Ct. 2246, 147 L. Ed. 2d 326 (2000).

Fla.—Whiley v. Scott, 79 So. 3d 702 (Fla. 2011).
Miss.—Jones v. City of Ridgeland, 48 So. 3d 530 (Miss. 2010).
N.H.—Fischer v. Superintendent, Strafford County House of Corrections, 163 N.H. 515, 44 A.3d 493 (2012).
N.C.—Dickson v. Rucho, 366 N.C. 332, 737 S.E.2d 362 (2013).
W. Va.—State ex rel. State Farm Mut. Auto. Ins. Co. v. Marks, 230 W. Va. 517, 741 S.E.2d 75 (2012).

**Scope of judicial inquiry**

Under a state constitution, the inquiry in separation-of-powers questions is whether the power in issue has been explicitly granted to one branch of state government and to no other branch; if so, the section of the separation-of-powers article explicitly requiring that no one person exercise powers of more than one of three branches of government forbids another branch to exercise such power.

Me.—State v. Hunter, 447 A.2d 797 (Me. 1982).

10 Alaska—Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).
Cal.—Pipkin v. Board of Supervisors, 82 Cal. App. 3d 652, 147 Cal. Rptr. 502 (3d Dist. 1978).
Mont.—State ex rel. Morales v. City Commission of City of Helena, 174 Mont. 237, 570 P.2d 887 (1977).
W. Va.—State ex rel. Barker v. Manchin, 167 W. Va. 155, 279 S.E.2d 622 (1981).

11 U.S.—Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), judgment aff'd, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).
Wis.—State v. Chvala, 2003 WI App 257, 268 Wis. 2d 451, 673 N.W.2d 401 (Ct. App. 2003).

**Actions unconstitutional**

When the actions of one branch of government defeat or materially impair the inherent functions of another branch, such actions are unconstitutional under the doctrine of separation of powers.

N.H.—State v. Merrill, 160 N.H. 467, 999 A.2d 221 (2010).

**Legislative veto**

The single-house veto provision of a statute contravened the separation-of-powers principle by authorizing the legislature to share powers properly exercisable by the other two branches.

U.S.—Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425 (D.C. Cir. 1982), judgment aff'd, 463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402, 77 L. Ed. 2d 1403, 77 L. Ed. 2d 1413 (1983).

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## § 275. Equal and exclusive nature of branches of government

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2330 to 2333

**Since all the departments of government derive their authority from the same source, they in equal degree represent the sovereignty, and each within its own sphere is supreme and independent, and the several departments are not merely equal but are also exclusive.**

Since all the departments of government derive their authority from the same source, they in equal degree represent the sovereignty, and each within its own sphere is supreme and independent,[1] and the several departments are not merely equal but are also exclusive.[2] Neither of the three separate departments of government is subordinate to any other,[3] and neither can arrogate to itself any control over either one of the others in matters which have been confined by the constitution to such other department.[4]

***Delegation of authority.***

Each of the departments of government must perform the duties assigned to it[5] and may not delegate such duties to another department.[6]

  

**CUMULATIVE SUPPLEMENT**

**Cases:**

The Wisconsin Constitution establishes three separate branches of government, with no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution, and no branch to exercise the power committed by the constitution to another; legislative power is vested in a senate and assembly, executive power is vested in a governor, and judicial power is vested in a unified court system. Wis. Const. art. 4, § 1 et seq.; Wis. Const. art. 5, § 1 et seq.; Wis Const. art. 7, § 1 et seq. Koschkee v. Taylor, 2019 WI 76, 929 N.W.2d 600 (Wis. 2019).

**[END OF SUPPLEMENT]**



Footnotes

1 U.S.—O'Donoghue v. U.S., 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356 (1933).
Conn.—Massameno v. Statewide Grievance Committee, 234 Conn. 539, 663 A.2d 317 (1995).
Iowa—Webster County Bd. of Sup'rs v. Flattery, 268 N.W.2d 869 (Iowa 1978).
Me.—Board of Overseers of The Bar v. Lee, 422 A.2d 998 (Me. 1980).
Mont.—State ex rel. Morales v. City Commission of City of Helena, 174 Mont. 237, 570 P.2d 887 (1977).
**Coequal branches**
Miss.—Jones v. City of Ridgeland, 48 So. 3d 530 (Miss. 2010).
Mont.—MEA-MFT v. McCulloch, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075 (2012).
N.Y.—Maron v. Silver, 14 N.Y.3d 230, 899 N.Y.S.2d 97, 925 N.E.2d 899 (2010).

2 Conn.—Adams v. Rubinow, 157 Conn. 150, 251 A.2d 49 (1968).
Iowa—State v. Ronek, 176 N.W.2d 153, 41 A.L.R.3d 1329 (Iowa 1970).
N.Y.—Zimmerman v. State, 76 Misc. 2d 193, 348 N.Y.S.2d 727 (Ct. Cl. 1973).
Tex.—Ex parte Giles, 502 S.W.2d 774 (Tex. Crim. App. 1973).
As to encroachment with regard to separation of powers, generally, see § 274.
**Effect of delegation of power**
Every positive delegation of power by the state constitution to one officer or department of government implies negation of its exercise by any other officer or department.
Okla.—Board of Regents of University of Oklahoma v. Baker, 1981 OK 160, 638 P.2d 464, 1 Ed. Law Rep. 1335 (Okla. 1981).

3 Ark.—Wells v. Purcell, 267 Ark. 456, 592 S.W.2d 100 (1979).
Nev.—Berkson v. LePome, 245 P.3d 560, 126 Nev. Adv. Op. No. 46 (Nev. 2010).
N.Y.—In re Tiffany A., 183 Misc. 2d 391, 703 N.Y.S.2d 381 (Fam. Ct. 2000), aff'd, 279 A.D.2d 522, 723 N.Y.S.2d 859 (2d Dep't 2001).

4 U.S.—U.S. v. Moussaoui, 382 F.3d 453 (4th Cir. 2004).
Ark.—Wells v. Purcell, 267 Ark. 456, 592 S.W.2d 100 (1979).
Cal.—In re Lira, 58 Cal. 4th 573, 167 Cal. Rptr. 3d 409, 317 P.3d 619 (2014).

5 Neb.—In re Interest of A.M., Jr., 281 Neb. 482, 797 N.W.2d 233 (2011).
N.J.—Essex County Corrections Officers PBA Local No. 382 v. County of Essex, 439 N.J. Super. 107, 106 A.3d 1238 (App. Div. 2014).

6 Fla.—Whiley v. Scott, 79 So. 3d 702 (Fla. 2011).
Idaho—State v. Armstrong, 2015 WL 569825 (Idaho Ct. App. 2015).
S.C.—Hampton v. Haley, 403 S.C. 395, 743 S.E.2d 258 (2013).
S.D.—State v. Moschell, 2004 SD 35, 677 N.W.2d 551 (S.D. 2004).
**Nondelegation doctrine**
The nondelegation doctrine is rooted in the principle of separation-of-powers that underlies the tripartite system of the United States government.

U.S.—Hachem v. Holder, 656 F.3d 430 (6th Cir. 2011).

**Cannot be evaded by agreement**

The prohibition of the article of the constitution governing the separation-of-powers cannot be evaded by an agreement between one branch of government and another.

Mass.—Brach v. Chief Justice of Dist. Court Dept., 386 Mass. 528, 437 N.E.2d 164 (1982).

End of Document

# 16 C.J.S. Constitutional Law § 276

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**A. Separation of Powers**

## § 276. Application of federal separation-of-powers doctrine to states

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2330 to 2333

**The separation-of-powers doctrine embodied in the United States Constitution is not mandatory insofar as the states are concerned, and the states are free to distribute the powers of government as they see fit between the various branches of government.**

The separation-of-powers doctrine which is embodied in the United States Constitution is not mandatory in state governments[1] and is not enforceable against the states as a matter of constitutional law.[2] It is for the State to determine whether and to what extent its powers will be kept separate between the three branches of government[3] or whether persons belonging to one department may exert powers which, strictly speaking, pertain to another department of government. A state's determination one way or the other cannot be an element in the inquiry whether due process of law has been respected by the state or its representatives.[4]

Stated otherwise, the Due Process Clause of the Fourteenth Amendment of the United States Constitution does not embrace the federal concept of the separation of powers,[5] and the Fourteenth Amendment leaves the states free to distribute the powers of government as they will between the various branches thereof.[6] However, the same principles of separation-of-powers that apply to the United States Constitution have been applied under state constitutions.[7]

  

***Federal-state relations.***

The separation-of-powers doctrine is not applicable in the area of federal-state relations.[8]

**CUMULATIVE SUPPLEMENT**

**Cases:**

When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. Ziglar v. Abbasi, 2017 WL 2621317 (U.S. 2017).

**[END OF SUPPLEMENT]**



Footnotes

1 U.S.—Sweezy v. State of N.H. by Wyman, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957); Daniels v. Area Plan Com'n of Allen County, 306 F.3d 445 (7th Cir. 2002).
**Does not prescribe allocation of powers within state governments**
The United States Constitution does not prescribe the allocation of powers within state governments, not even the clause guaranteeing to each state a republican form of government.
U.S.—Beary Landscaping, Inc. v. Costigan, 667 F.3d 947 (7th Cir. 2012).

2 U.S.—Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981); May v. Supreme Court of State of Colo., 508 F.2d 136 (10th Cir. 1974); Snell v. Wyman, 281 F. Supp. 853 (S.D. N.Y. 1968), judgment aff'd, 393 U.S. 323, 89 S. Ct. 553, 21 L. Ed. 2d 511 (1969).

3 U.S.—Dreyer v. People of State of Illinois, 187 U.S. 71, 23 S. Ct. 28, 47 L. Ed. 79 (1902).
Pa.—City Council, City of Reading v. Eppihimer, 835 A.2d 883 (Pa. Commw. Ct. 2003).

4 U.S.—Dreyer v. People of State of Illinois, 187 U.S. 71, 23 S. Ct. 28, 47 L. Ed. 79 (1902).
Mich.—In re Southard, 298 Mich. 75, 298 N.W. 457 (1941).

5 U.S.—Avens v. Wright, 320 F. Supp. 677 (W.D. Va. 1970).

6 U.S.—International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 309 v. Hanke, 339 U.S. 470, 70 S. Ct. 773, 94 L. Ed. 995, 57 Ohio L. Abs. 330, 13 A.L.R.2d 631 (1950).

7 Mich.—National Wildlife Federation v. Cleveland Cliffs Iron Co., 471 Mich. 608, 684 N.W.2d 800 (2004) (overruled on other grounds by, Lansing Schools Educ. Ass'n v. Lansing Bd. of Educ., 487 Mich. 349, 792 N.W.2d 686, 263 Ed. Law Rep. 360 (2010)).

8 U.S.—Kwai Chiu Yuen v. Immigration and Naturalization Service, 406 F.2d 499 (9th Cir. 1969).
**A.L.R. Library**
Validity of State and Local Statutes Allegedly Infringing on Federal Government's Exclusive Power over Foreign Affairs—Nonalien Cases, 108 A.L.R.5th 189.

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**Constitutional Law**
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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**A. Separation of Powers**

## § 277. Limitations of doctrine of separation of powers

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2330 to 2333

**The doctrine of separation-of-powers is not an immutable principle and does not mean that each branch of government is prohibited from any activity that might have an impact on another.**

The doctrine of separation-of-powers is a structural safeguard, or a prophylactic device, rather than an immutable principle.[1] In fact, the courts recognize that the separation of the powers is far from complete.[2] The doctrine of separation-of-powers has no rigid[3] or precise[4] boundaries. As it has been judicially declared, the boundaries between the three branches of government are not hermetically sealed[5] and cannot be divided into watertight compartments.[6]

It is not the purpose of the constitution to make a total separation of the three powers.[7] Separation-of-powers does not mean that each branch of government is prohibited from any activity that might have an impact on another.[8] The doctrine prohibiting the exercise by one department of another's powers does not include all governmental functions or powers.[9] Accordingly, the separation-of-powers doctrine is inapplicable to one performing merely ministerial[10] or administrative functions.[11]

  

The delineation of the respective powers of each branch should usually be made on a case-by-case basis.[12] When considering if there has been a violation of the separation-of-powers doctrine, a court must examine the specific facts and circumstances presented and search for a usurpation by one branch of government of the powers of another.[13]

***Local administration.***

The application of the doctrine is confined mainly to the sphere of the central government,[14] and it finds little observance in municipal corporations[15] or in other units of local government.[16] Thus, a commission form of government with blended powers may be established by statute unless otherwise prohibited by the constitution.[17] On the other hand, under some authority, the separation-of-powers doctrine has been applied on a local level.[18]

**CUMULATIVE SUPPLEMENT**

**Cases:**

A State's interest in achieving greater separation of church and State than is already ensured under the Establishment Clause is limited by the Free Exercise Clause. U.S. Const. Amend. 1. Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020).

The longstanding practice of the Legislative Branch and the Executive Branch, of resolving, without benefit of guidance from the Supreme Court, disputes concerning congressional efforts to seek official Executive Branch information, is a consideration of great weight in cases concerning the allocation of power between the two elected branches of Government, and it imposes on the Supreme Court a duty of care to ensure that it does not needlessly disturb the compromises and working arrangements that those Branches themselves have reached. Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020).

The Constitution confers limited authority on each branch of the Federal Government. U.S.C.A. Const. Art. 1, § 1; U.S.C.A. Const. Art. 2, § 1, cl. 2; U.S.C.A. Const. Art. 3, § 1. Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).

**[END OF SUPPLEMENT]**



Footnotes

1 Mich.—Mayor of Detroit v. Arms Technology, Inc., 258 Mich. App. 48, 669 N.W.2d 845 (2003).

2 U.S.—Mistretta v. U.S., 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989).
Colo.—Dee Enterprises v. Industrial Claim Appeals Office of State of Colo., 89 P.3d 430 (Colo. App. 2003).
Fla.—Abdool v. Bondi, 141 So. 3d 529 (Fla. 2014).
Ga.—Albany Surgical, P.C. v. Georgia Dept. of Community Health, 278 Ga. 366, 602 S.E.2d 648 (2004).
Ill.—In re Derrico G., 2014 IL 114463, 383 Ill. Dec. 679, 15 N.E.3d 457 (Ill. 2014).
Va.—Montgomery v. Com., 62 Va. App. 656, 751 S.E.2d 692 (2013).

3 Conn.—Pools by Murphy and Sons, Inc. v. Department of Consumer Protection, 48 Conn. Supp. 248, 841 A.2d 292 (Super. Ct. 2003).
Ill.—Morawicz v. Hynes, 401 Ill. App. 3d 142, 340 Ill. Dec. 893, 929 N.E.2d 544 (1st Dist. 2010).
Iowa—State v. Ragland, 836 N.W.2d 107 (Iowa 2013).
N.H.—State v. Addison, 165 N.H. 381, 87 A.3d 1 (2013).
Utah—Jones v. Utah Board of Pardons & Parole, 2004 UT 53, 94 P.3d 283 (Utah 2004).

4 La.—State v. Umezulike, 866 So. 2d 794 (La. 2004).

5 U.S.—Miller v. French, 530 U.S. 327, 120 S. Ct. 2246, 147 L. Ed. 2d 326 (2000).
Ariz.—State v. Gilfillan, 196 Ariz. 396, 998 P.2d 1069 (Ct. App. Div. 1 2000).
Mo.—McPherson v. U.S. Physicians Mut. Risk Retention Group, 99 S.W.3d 462 (Mo. Ct. App. W.D. 2003).
Wash.—State v. Gresham, 173 Wash. 2d 405, 269 P.3d 207 (2012).

6 Colo.—People v. Owens, 228 P.3d 969 (Colo. 2010).
Haw.—Akahane v. Fasi, 58 Haw. 74, 565 P.2d 552 (1977).
Mass.—Com. v. Gonsalves, 432 Mass. 613, 739 N.E.2d 1100 (2000).
N.H.—Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981).

7 U.S.—Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); U.S. v. Stegman, 295 F. Supp. 2d 542 (D. Md. 2003).
Ga.—Perdue v. Baker, 277 Ga. 1, 586 S.E.2d 606 (2003).
Minn.—State v. Baxter, 686 N.W.2d 846 (Minn. Ct. App. 2004).

8 U.S.—U.S. v. Moussaoui, 382 F.3d 453 (4th Cir. 2004).
Cal.—Steen v. Appellate Div., Superior Court, 59 Cal. 4th 1045, 175 Cal. Rptr. 3d 760, 331 P.3d 136 (2014).

9 Ill.—City of Waukegan v. Pollution Control Bd., 57 Ill. 2d 170, 311 N.E.2d 146, 81 A.L.R.3d 1246 (1974).
Iowa—State v. Ragland, 836 N.W.2d 107 (Iowa 2013).

10 Cal.—St. John v. Superior Court, 87 Cal. App. 3d 30, 150 Cal. Rptr. 697 (4th Dist. 1978).
Nev.—City of Sparks v. Sparks Mun. Court, 302 P.3d 1118, 129 Nev. Adv. Op. No. 38 (Nev. 2013).

11 Fla.—State v. Duval County, 76 Fla. 180, 79 So. 692 (1918).

12 Colo.—C. C. C. v. District Court for Fourth Judicial Dist., 188 Colo. 437, 535 P.2d 1117 (1975).
Neb.—Lux v. Mental Health Bd. of Polk County, 202 Neb. 106, 274 N.W.2d 141 (1979).

13 Kan.—Gannon v. State, 298 Kan. 1107, 319 P.3d 1196, 302 Ed. Law Rep. 377 (2014).
As to usurpation in this regard, see § 279.

14 Ind.—State ex rel. Buttz v. Marion Circuit Court, 225 Ind. 7, 72 N.E.2d 225, 170 A.L.R. 187 (1947).

15 N.J.—Smith v. Hazlet Tp., 63 N.J. 523, 309 A.2d 210 (1973).
R.I.—Moreau v. Flanders, 15 A.3d 565 (R.I. 2011).
Tex.—City of El Paso v. Arditti, 378 S.W.3d 661 (Tex. App. El Paso 2012).

16 Ga.—Tendler v. Thompson, 256 Ga. 633, 352 S.E.2d 388 (1987).
Ind.—Willsey v. Newlon, 161 Ind. App. 332, 316 N.E.2d 390 (1974).
Md.—County Council for Montgomery County v. Investors Funding Corp., 270 Md. 403, 312 A.2d 225 (1973).
Mich.—Mayor of Cadillac v. Blackburn, 306 Mich. App. 512, 857 N.W.2d 529 (2014).

17 Ind.—Sarlls v. State ex rel. Trimble, 201 Ind. 88, 166 N.E. 270, 67 A.L.R. 718 (1929).

18 Cal.—City and County of San Francisco v. Cooper, 13 Cal. 3d 898, 120 Cal. Rptr. 707, 534 P.2d 403 (1975).

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**A. Separation of Powers**

## § 278. Limitations of doctrine of separation of powers—Practical, expedient, flexible doctrine

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2330 to 2333

**The doctrine of separation-of-powers contemplates some overlapping and duality as a matter of practical and essential expedience; the principle is sufficiently flexible to permit practical arrangements in a complex government.**

The doctrine of separation-of-powers contemplates some overlapping and duality as a matter of practical and essential expediency.[1] While the three branches of government must remain entirely free from the control of coercive influence, direct or indirect, of either of the others, a degree of overlapping responsibility and a duty of interdependence is both expected and necessary.[2] Hence, in practice, the departments are not required to be kept entirely distinct without any connection with, or dependence on, each other.[3] Each of the three departments normally exercises powers which are not strictly within its province[4] or which could also be given to another department.[5] Thus, encroachment of a prohibited nature is not necessarily shown by the nature of the power exercised or the duty performed.[6]

The separation-of-powers principle is sufficiently flexible to permit practical arrangements in a complex government.[7] The doctrine is designed to prevent a single branch from assuming inordinate power but does not bar cooperative action among the branches of government;[8] it guarantees a system of checks and balances.[9] The doctrine does not prevent one branch from

  

assuming certain functions from another branch which would aid its internal operations without unduly restricting the endeavors of the other coordinate branch.[10]

## CUMULATIVE SUPPLEMENT

**Cases:**

The Free Exercise Clause protects against even indirect coercion, and a State punishes the free exercise of religion by disqualifying the religious from government aid. U.S. Const. Amend. 1. Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020).

Separation of powers doctrine precluded Supreme Judicial Court from entertaining State Senate's challenges to Secretary of State's authority, in absence of additional explicit legislative action, to arrange for security, possession, and transportation of ballots in ranked-choice voting primary election; Court could not ignore separation of powers problems based on suggestion that logistics of implementing ranked-choice voting created constitutional crisis, and Senate's challenge regarded epitome of governmental action in which courts lacked authority to meddle. Me. Const. art. 3, §§ 1, 2. Maine Senate v. Secretary of State, 2018 ME 52, 183 A.3d 749 (Me. 2018).

## [END OF SUPPLEMENT]



Footnotes

1 U.S.—Mistretta v. U.S., 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989).
Ariz.—State v. Montes, 226 Ariz. 194, 245 P.3d 879 (2011).
Colo.—Dee Enterprises v. Industrial Claim Appeals Office of State of Colo., 89 P.3d 430 (Colo. App. 2003).
Ga.—Albany Surgical, P.C. v. Georgia Dept. of Community Health, 278 Ga. 366, 602 S.E.2d 648 (2004).
Vt.—Hunter v. State, 177 Vt. 339, 2004 VT 108, 865 A.2d 381 (2004).
**Power incidentally affected**
In certain situations, one branch of government properly can exercise a function that only incidentally affects a power vested primarily in another branch of government.
Cal.—Burlington Northern and Sante Fe Ry. Co. v. Public Utilities Com'n, 112 Cal. App. 4th 881, 5 Cal. Rptr. 3d 503 (3d Dist. 2003).

2 U.S.—U.S. v. Gonzalez, 682 F.3d 201 (2d Cir. 2012).

3 Cal.—In re M.C., 199 Cal. App. 4th 784, 131 Cal. Rptr. 3d 194 (1st Dist. 2011).
Ill.—City of Waukegan v. Pollution Control Bd., 57 Ill. 2d 170, 311 N.E.2d 146, 81 A.L.R.3d 1246 (1974).

4 Cal.—Younger v. Superior Court, 21 Cal. 3d 102, 145 Cal. Rptr. 674, 577 P.2d 1014 (1978).
Md.—Attorney General of Maryland v. Waldron, 289 Md. 683, 426 A.2d 929, 17 A.L.R.4th 794 (1981).
Okla.—Tweedy v. Oklahoma Bar Ass'n, 1981 OK 12, 624 P.2d 1049 (Okla. 1981).
**Partial agency**
Separation-of-powers does not mean that the branches ought to have no partial agency in, or no control over, the acts of each other.
U.S.—Clinton v. Jones, 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997).

5 Ill.—Board of Ed. of Waverly Community Unit School Dist. No. 6 v. Nickell, 410 Ill. 98, 101 N.E.2d 438 (1951).

6 Del.—Trustees of New Castle Common v. Gordy, 33 Del. Ch. 334, 93 A.2d 509, 40 A.L.R.2d 544 (1952).
As to protection from encroachment, generally, see § 274.

7 Ga.—Wolcott v. State, 278 Ga. 664, 604 S.E.2d 478 (2004).
**Blending of powers**

An unyielding separation-of-powers is impracticable in a complex government, and some blending of powers is constitutionally acceptable.

Ariz.—Cook v. State, 230 Ariz. 185, 281 P.3d 1053 (Ct. App. Div. 1 2012).

8 Del.—Opinion of the Justices, 330 A.2d 764 (Del. 1974).

N.H.—Opinion of The Justices, 113 N.H. 287, 306 A.2d 55 (1973).

N.J.—Brown v. Heymann, 62 N.J. 1, 297 A.2d 572 (1972).

Tenn.—In re Bell, 344 S.W.3d 304 (Tenn. 2011).

Wis.—State v. Holmes, 106 Wis. 2d 31, 315 N.W.2d 703 (1982).

**Assistance of coordinate branches**

The separation-of-powers principle does not prevent Congress from obtaining the assistance of its coordinate branches.

U.S.—Mistretta v. U.S., 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989).

**Vindication of separation-of-powers principles**

Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the government, each contributing to a lawful objective through its own processes.

U.S.—Loving v. U.S., 517 U.S. 748, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996).

9 U.S.—Mistretta v. U.S., 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989).

Ky.—Bell v. Com., Cabinet for Health and Family Services, Dept. for Community Based Services, 423 S.W.3d 742 (Ky. 2014).

N.H.—Fischer v. Superintendent, Strafford County House of Corrections, 163 N.H. 515, 44 A.3d 493 (2012).

N.J.—Perth Amboy Bd. of Educ. v. Christie, 413 N.J. Super. 590, 997 A.2d 262, 258 Ed. Law Rep. 325 (App. Div. 2010).

10 Mass.—Opinions of the Justices to the Senate, 372 Mass. 883, 363 N.E.2d 652 (1977).

**Incidental affect**

The separation-of-powers doctrine is not intended to prohibit one branch from taking action properly within its sphere that has the incidental effect of duplicating a function or procedure delegated to another branch.

Cal.—Younger v. Superior Court, 21 Cal. 3d 102, 145 Cal. Rptr. 674, 577 P.2d 1014 (1978).

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**A. Separation of Powers**

## § 279. Limitations of doctrine of separation of powers—Usurping power

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2330 to 2333

**The legislative, executive, and judicial branches of government may exercise only their own powers and may not usurp the powers of another coequal branch of government, and unless one branch is usurping the power of another and coercively influencing the other, there is no violation of the separation-of-powers doctrine.**

The legislative, executive, and judicial branches of government may exercise only their own powers and may not usurp the powers of another coequal branch of government.[1] Thus, unless one branch is usurping the power of another and coercively influencing the other, there is no violation of the separation-of-powers doctrine.[2] In this connection, a usurpation of powers exists where there is a complete[3] or significant interference[4] by one department with the operation of another department.

In determining whether an act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the affected branch from accomplishing its constitutionally assigned functions.[5] In determining whether a usurpation of powers exists, a court should consider: (1) the essential nature of the power being exercised; (2) the degree of control by one department over another; (3) the objective sought to be attained by that branch's exercise of power; and (4) the practical result of the blending of powers as shown by actual experience over a period of time.[6] In any event, in order to

  

determine what one branch may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination.[7]



Footnotes

1 Colo.—Vagneur v. City of Aspen, 2013 CO 13, 295 P.3d 493 (Colo. 2013).
Ind.—Lemmon v. Harris, 949 N.E.2d 803 (Ind. 2011).
N.H.—State v. Martin, 164 N.H. 687, 62 A.3d 864 (2013).
R.I.—Moreau v. Flanders, 15 A.3d 565 (R.I. 2011).
S.C.—Harleysville Mut. Ins. Co. v. State, 401 S.C. 15, 736 S.E.2d 651 (2012).

2 Colo.—Anderson v. Lamm, 195 Colo. 437, 579 P.2d 620 (1978).
Ga.—Harrison Co. v. Code Revision Commission, 244 Ga. 325, 260 S.E.2d 30 (1979).
Kan.—Parcell v. State, 228 Kan. 794, 620 P.2d 834 (1980).
Ohio—State ex rel. AFSCME v. Taft, 156 Ohio App. 3d 37, 2004-Ohio-493, 804 N.E.2d 88 (3d Dist. Allen County 2004).
Tenn.—Underwood v. State, 529 S.W.2d 45 (Tenn. 1975).

3 Cal.—Way v. Superior Court, 74 Cal. App. 3d 165, 141 Cal. Rptr. 383 (3d Dist. 1977).

4 Kan.—Miller v. Johnson, 295 Kan. 636, 289 P.3d 1098 (2012).
Wis.—State v. Chvala, 2004 WI App 53, 271 Wis. 2d 115, 678 N.W.2d 880 (Ct. App. 2004), decision aff'd, 2005 WI 30, 279 Wis. 2d 216, 693 N.W.2d 747 (2005).
**Trammeling core function**
Under the separation-of-powers doctrine, when one branch of the state government trammels on a core function assigned to another branch, a court has the authority to declare the usurper's activities to be invalid.
Cal.—People v. Solis, 232 Cal. App. 4th 1108, 181 Cal. Rptr. 3d 877 (2d Dist. 2015).

5 U.S.—Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977); Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), judgment aff'd, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).
Vt.—Hunter v. State, 177 Vt. 339, 2004 VT 108, 865 A.2d 381 (2004).
**Threatens independence or integrity or invades prerogatives**
The question to be asked in a separation-of-powers analysis is not whether two branches of government engage in coinciding activities but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.
Wash.—In re Disciplinary Proceeding Against Petersen, 180 Wash. 2d 768, 329 P.3d 853 (2014).

6 Ariz.—Cook v. State, 230 Ariz. 185, 281 P.3d 1053 (Ct. App. Div. 1 2012).
Kan.—Miller v. Johnson, 295 Kan. 636, 289 P.3d 1098 (2012).

7 U.S.—U.S. v. Jennings, 652 F.3d 290 (2d Cir. 2011).

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## Research References

**A.L.R. Library**

A.L.R. Index, Constitutional Law
A.L.R. Index, Separation of Powers
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**1. Legislative Powers, in General**

## § 280. Legislative powers, generally; definitions

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2340 to 2342

**Legislative power is the power to enact laws or to declare what the law will be, and the legislative function involves the exercise of discretion as to the contents of statutes and their policy.**

"Legislative power" has been defined as the power to pass rules of law for the government and regulation of people or property[1] or as the power to enact laws or to declare what the law will be.[2] Legislative power is defined by the work product it generates, namely, the promulgation of laws of general applicability; when the government legislates, it establishes a generally applicable rule that sets the governing standard for all cases coming within its terms.[3]

The "legislative function" involves the exercise of discretion as to the contents of statutes and their policy.[4] Thus, the principal function of a legislature is not to make contracts but to make laws that establish the policy of the governmental body.[5]

Footnotes

1 Iowa—Schneberger v. State Board of Social Welfare, 228 Iowa 399, 291 N.W. 859 (1940).

2 Haw.—Hussey v. Say, 133 Haw. 229, 325 P.3d 641 (Ct. App. 2014).

Kan.—State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan., 264 Kan. 293, 955 P.2d 1136 (1998).

Okla.—Tweedy v. Oklahoma Bar Ass'n, 1981 OK 12, 624 P.2d 1049 (Okla. 1981).

**"Legislative authority"**

"Legislative authority" is the authority to make or enact laws, that is, the authority to establish rules and regulations governing conduct of the people, and their rights, duties, and procedures, and to prescribe the consequences of certain activities; and usually, it operates prospectively.

N.C.—Kindsgrab v. State Bd. of Barber Examiners, 763 S.E.2d 913 (N.C. Ct. App. 2014).

**Distinction**

For purposes of separation of powers, "administrative power" is the power to administer or enforce laws while "legislative power" is the power to make laws rather than the power to enforce them.

Kan.—Kansas One-Call System, Inc. v. State, 294 Kan. 220, 274 P.3d 625 (2012).

3 Colo.—Vagneur v. City of Aspen, 2013 CO 13, 295 P.3d 493 (Colo. 2013).

4 Fla.—State v. Barquet, 262 So. 2d 431 (Fla. 1972).

Iowa—State v. Watts, 186 N.W.2d 611 (Iowa 1971).

Okla.—City of Sand Springs v. Department of Public Welfare, 1980 OK 36, 608 P.2d 1139 (Okla. 1980).

**Principal function to make laws that establish policy of state**

U.S.—National R.R. Passenger Corp. v. Atchison Topeka and Santa Fe Ry. Co., 470 U.S. 451, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985).

**Vindicating public interest**

Vindicating the public interest, including the public interest in government observance of the constitution and laws, is the function of the legislature and the chief executive.

Tex.—Andrade v. NAACP of Austin, 345 S.W.3d 1 (Tex. 2011).

**Declaration of law and public policy**

It is the legislature's function through the enactment of statutes to declare what is the law and public policy.

Neb.—City of Falls City v. Nebraska Mun. Power Pool, 281 Neb. 230, 795 N.W.2d 256 (2011).

5 Cal.—Retired Employees Assn. of Orange County, Inc. v. County of Orange, 52 Cal. 4th 1171, 134 Cal. Rptr. 3d 779, 266 P.3d 287 (2011).

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**1. Legislative Powers, in General**

## § 281. Nature and scope of legislative power

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2340

**The legislative department of government is the one which makes the laws, and the legislative power covers every subject of legitimate legislation except as limited by constitutional provisions.**

While it has been said that under the constitution the people are the source of all legislative authority,[1] ordinarily, the legislative department of government is the one which makes the laws[2] and which determines public policy.[3] Only the legislature has the power to make law[4] and define the scope of legislative actions,[5] and the decision to extend the scope of an existing statute is also a matter for the legislature.[6] Concerns about the propriety, wisdom, necessity, and expediency of legislation can only be resolved by the legislative branch of government.[7]

As compared with the other departments of government, the legislature possesses the exclusive authority under the constitution or frame of government to make, alter, or repeal laws.[8] The legislative function, except as limited by state or national constitutions, is equal and not subordinate to the judicial function,[9] and the legislature is the ultimate guardian of the liberties and welfare of the people in quite as great a degree as the courts.[10]

  

***Subjects of legislation.***

The legislative power covers every subject of legitimate legislation except as limited by constitutional provisions, and the legislature generally has the power to say what will be permitted or forbidden.[11] Accordingly, it may declare, and provide for, a public purpose;[12] determine the rights of individuals, except as otherwise provided by the constitution;[13] and create new rights.[14]



Footnotes

1 Utah—Carter v. Lehi City, 2012 UT 2, 269 P.3d 141 (Utah 2012).
Wash.—State ex rel. Linn v. Superior Court for King County, 20 Wash. 2d 138, 146 P.2d 543 (1944).

2 U.S.—Utility Air Regulatory Group v. E.P.A., 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014).
Ariz.—Cook v. State, 230 Ariz. 185, 281 P.3d 1053 (Ct. App. Div. 1 2012).
Ark.—Arkansas State Bd. of Election Com'rs v. Pulaski County Election Com'n, 2014 Ark. 236, 437 S.W.3d 80 (2014).
Neb.—Manon v. Orr, 289 Neb. 484, 856 N.W.2d 106 (2014).
N.J.—Perth Amboy Bd. of Educ. v. Christie, 413 N.J. Super. 590, 997 A.2d 262, 258 Ed. Law Rep. 325 (App. Div. 2010).
**Exception for people's right of initiative and referendum**
Cal.—California Redevelopment Assn. v. Matosantos, 53 Cal. 4th 231, 135 Cal. Rptr. 3d 683, 267 P.3d 580 (2011).

3 U.S.—F.T.C. v. Jantzen, Inc., 386 U.S. 228, 87 S. Ct. 998, 18 L. Ed. 2d 11 (1967).
Colo.—Hamill v. Cheley Colorado Camps, Inc., 262 P.3d 945 (Colo. App. 2011).
Mont.—Fisher ex rel. McCartney v. State Farm Mut. Auto. Ins. Co., 2013 MT 208, 371 Mont. 147, 305 P.3d 861 (2013).
Neb.—City of Falls City v. Nebraska Mun. Power Pool, 281 Neb. 230, 795 N.W.2d 256 (2011).
N.C.—In re N.T., 214 N.C. App. 136, 715 S.E.2d 183 (2011).
Tenn.—Hodge v. Craig, 382 S.W.3d 325 (Tenn. 2012).
**Ultimate arbiter of public policy**
A fundamental principle of the constitutional separation-of-powers among the three branches of government is that the legislative branch of government is the ultimate arbiter of public policy, and in fulfilling that role, the legislature is entrusted with the power to continually refine the laws to meet the needs of its citizens.
Ohio—Stetter v. R.J. Corman Derailment Servs., L.L.C., 125 Ohio St. 3d 280, 2010-Ohio-1029, 927 N.E.2d 1092 (2010).

4 Idaho—State v. Straub, 153 Idaho 882, 292 P.3d 273 (2013).
Tex.—Martinez v. State, 323 S.W.3d 493 (Tex. Crim. App. 2010).

5 Iowa—Clay County v. Public Employment Relations Bd., 784 N.W.2d 1 (Iowa 2010).

6 N.M.—Clark v. Lovelace Health Systems, Inc., 136 N.M. 411, 2004-NMCA-119, 99 P.3d 232 (Ct. App. 2004).

7 Va.—Mouberry v. Com., 39 Va. App. 576, 575 S.E.2d 567 (2003).

8 U.S.—Tennessee Valley Authority v. Hill, 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978).
Cal.—Pitney-Bowes, Inc. v. State of California, 108 Cal. App. 3d 307, 166 Cal. Rptr. 489 (2d Dist. 1980).
Kan.—Gannon v. State, 298 Kan. 1107, 319 P.3d 1196, 302 Ed. Law Rep. 377 (2014).
Miss.—Fairley v. George County, 871 So. 2d 713 (Miss. 2004).
N.Y.—People v. Shepard, 50 N.Y.2d 640, 431 N.Y.S.2d 363, 409 N.E.2d 840 (1980).
Pa.—Bucks County Services, Inc. v. Philadelphia Parking Authority, 104 A.3d 604 (Pa. Commw. Ct. 2014).
As to the constitution as a limitation or restriction of legislative power, see § 147.
**Only legislature can amend statute**

Cal.—Maral v. City of Live Oak, 221 Cal. App. 4th 975, 164 Cal. Rptr. 3d 804 (3d Dist. 2013), review denied, (Mar. 26, 2014).

9 Mo.—State on Information of Danforth v. Banks, 454 S.W.2d 498 (Mo. 1970).

10 U.S.—Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S. Ct. 869, 84 L. Ed. 1108 (1940).
Mo.—State on Information of Danforth v. Banks, 454 S.W.2d 498 (Mo. 1970).
Wash.—Brewer v. Copeland, 86 Wash. 2d 58, 542 P.2d 445 (1975).

11 Del.—State v. Tabasso Homes, 42 Del. 110, 28 A.2d 248 (Gen. Sess. 1942).
Okla.—In re House Bill No. 145, 1951 OK 288, 205 Okla. 364, 237 P.2d 624 (1951).
S.C.—Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798 (1953).
As to illustrations of legislative powers, see § 283.

**Prophylactic legislation**

Under the section of the Fourteenth Amendment granting Congress the power to enforce the substantive guarantees of the Amendment, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.
U.S.—Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003).

12 Ill.—People v. Chicago Transit Authority, 392 Ill. 77, 64 N.E.2d 4 (1945).
Mich.—Gregory Marina, Inc. v. City of Detroit, 378 Mich. 364, 144 N.W.2d 503 (1966).

13 Cal.—Modern Barber Colleges v. California Employ. St. Com'n, 31 Cal. 2d 720, 192 P.2d 916 (1948).

14 U.S.—Oklahoma v. U.S. Civil Service Com'n, 330 U.S. 127, 67 S. Ct. 544, 91 L. Ed. 794 (1947).
Cal.—Alameda Tank Co. v. Starkist Foods, Inc., 103 Cal. App. 3d 428, 162 Cal. Rptr. 924 (2d Dist. 1980).
Neb.—Campbell v. City of Lincoln, 195 Neb. 703, 240 N.W.2d 339 (1976).

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**1. Legislative Powers, in General**

## § 282. Plenary legislative power

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2341

**The power of state legislatures has been considered plenary, meaning that all determinations are left to the legislature's broad discretion to adopt the means that it deems necessary and proper in complying with a constitutional directive, except as specifically limited by the constitution.**

The power of state legislatures has been considered plenary.[1] "Plenary power" means that all determinations are left to the legislature's broad discretion to adopt the means that it deems necessary and proper in complying with a constitutional directive.[2] Thus, unless that power is limited by express or inferential provisions of the constitution, the legislature may enact any law which in its discretion it may desire.[3] Under other authority, the general powers of the legislature, within constitutional limits, are considered almost plenary.[4]

Unlike the United States Congress, which possesses only those specific powers delegated to it by the United States Constitution, state legislatures possess plenary legislative authority except as specifically limited by the constitution.[5] Because the provisions of the constitution in the states are not considered grants of power but instead are limitations on the otherwise plenary power of the people of the state, exercised through its legislature, the legislature may enact any legislation that the state constitution

  

does not prohibit.[6] Stated otherwise, the legislative department has all power not expressly denied to it or given to another branch of the government.[7]

***Strong presumption created.***

Where the lawmaking power of the legislature under a state constitution is plenary, when the supreme court is asked to consider the constitutionality of an act of the legislature, the court must indulge a strong presumption that it is a proper exercise of the legislative power, and this presumption can be overcome only by a showing of a clear and palpable conflict with the constitution.[8]



Footnotes

1 Ariz.—Arizona Farm Bureau Federation v. Brewer, 226 Ariz. 16, 243 P.3d 619 (Ct. App. Div. 1 2010).
Cal.—California Redevelopment Assn. v. Matosantos, 53 Cal. 4th 231, 135 Cal. Rptr. 3d 683, 267 P.3d 580 (2011).
Ga.—DeKalb County School Dist. v. Georgia State Bd. of Educ., 294 Ga. 349, 751 S.E.2d 827, 300 Ed. Law Rep. 562 (2013).
La.—Louisiana Federation of Teachers v. State, 118 So. 3d 1033, 296 Ed. Law Rep. 666 (La. 2013).
N.C.—Saine v. State, 210 N.C. App. 594, 709 S.E.2d 379, 267 Ed. Law Rep. 897 (2011).
S.C.—Amisub of South Carolina, Inc. v. South Carolina Dept. of Health and Environmental Control, 407 S.C. 583, 757 S.E.2d 408 (2014).

2 R.I.—Woonsocket School Committee v. Chafee, 89 A.3d 778, 303 Ed. Law Rep. 924 (R.I. 2014).

3 Ariz.—Arizona Farm Bureau Federation v. Brewer, 226 Ariz. 16, 243 P.3d 619 (Ct. App. Div. 1 2010).
S.C.—Hampton v. Haley, 403 S.C. 395, 743 S.E.2d 258 (2013).

4 W. Va.—Johnson v. Board of Stewards of Charles Town Races, 225 W. Va. 340, 693 S.E.2d 93 (2010).

5 Cal.—Brown v. Chiang, 198 Cal. App. 4th 1203, 132 Cal. Rptr. 3d 48 (3d Dist. 2011).
Va.—FFW Enterprises v. Fairfax County, 280 Va. 583, 701 S.E.2d 795 (2010).
**Legislative power is limited only by federal and state constitutions**
Tenn.—Estate of Bell v. Shelby County Health Care Corp., 318 S.W.3d 823 (Tenn. 2010).

6 La.—Louisiana Federation of Teachers v. State, 118 So. 3d 1033, 296 Ed. Law Rep. 666 (La. 2013).

7 Ariz.—State ex rel. Napolitano v. Brown, 194 Ariz. 340, 982 P.2d 815 (1999).
Cal.—County of Riverside v. Superior Court, 30 Cal. 4th 278, 132 Cal. Rptr. 2d 713, 66 P.3d 718 (2003).
Del.—Tailor v. Becker, 708 A.2d 626 (Del. 1998).

8 Ga.—DeKalb County School Dist. v. Georgia State Bd. of Educ., 294 Ga. 349, 751 S.E.2d 827, 300 Ed. Law Rep. 562 (2013).

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**1. Legislative Powers, in General**

## § 283. Illustrations of legislative powers

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2340 to 2342

**The legislative power extends to, among other things, the ascertainment of pertinent facts for legislation, the creation and regulation of municipal corporations, the fixing and changing of boundaries of subordinate governmental units, the control of finances of the government, the regulation of public utilities, and the definition and punishment of offenses.**

Various matters have been considered within the scope of the legislative power, as distinguished from the powers of the judicial and executive departments,[1] such as the ascertainment of pertinent facts for legislation,[2] the reconfiguring and redistribution of authority to its subdivisions,[3] the creation and regulation of municipal corporations,[4] the creation and regulation of quasi-corporations for governmental purposes,[5] the establishment and reorganization of school districts,[6] and the fixing and changing of boundaries of subordinate governmental units.[7]

Other legislative powers include the control of finances of the government,[8] including the authority to determine the amount of appropriations necessary for the performance of the essential functions of government;[9] the manner of stimulation of the economy;[10] and the regulation of public utilities,[11] including the regulation of rates of public utilities.[12] Additional examples of

  

legislative powers include the police powers to protect the health, morals, order, safety, and general welfare of the community;[13] the establishment of regulations for governing businesses, occupations, or professions;[14] taxation;[15] and the regulation of elections.[16]

Furthermore, the legislature has power to direct that any work of public use and incidental private benefit will be done and that the expense of it will be a burden on the property benefited.[17] It is within the legislative power to distribute or allocate the burden of costs arising from the making of a public improvement.[18] It is likewise within the legislative power to define and declare public offenses and to prescribe the punishment therefor.[19]

***Cases of uncertainty.***

Where it is not clear whether an act falls within the exercise of legislative, executive, or judicial power, it is within the power of the legislature as the depository of the legislative power of the State to determine by which department such power will be exercised.[20]



Footnotes

1 U.S.—Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961).
Kan.—Gannon v. State, 298 Kan. 1107, 319 P.3d 1196, 302 Ed. Law Rep. 377 (2014).
Mich.—Okrie v. State of Mich., 306 Mich. App. 445, 857 N.W.2d 254 (2014).
Wash.—State v. Rice, 174 Wash. 2d 884, 279 P.3d 849 (2012).
**Prescribe rules of evidence and methods of proof**
Mass.—O'Malley v. Soske, 76 Mass. App. Ct. 495, 923 N.E.2d 552 (2010).
**Activity of lobbyists**
Ind.—Common Cause, Inc. v. State, 691 N.E.2d 1358 (Ind. Ct. App. 1998).
**Matters pertaining to gambling**
R.I.—In re Advisory Opinion to Governor, 856 A.2d 320 (R.I. 2004).
**Law of descent and distribution**
Wis.—Matter of Estate of Schneider, 150 Wis. 2d 286, 441 N.W.2d 335 (Ct. App. 1989).
**Form of wills**
Wash.—Matter of Estate of Malloy, 134 Wash. 2d 316, 949 P.2d 804 (1998).
**Governmental immunity from suit**
Minn.—Nichols v. State, Office of Secretary of State, 842 N.W.2d 20 (Minn. Ct. App. 2014), review granted, (Mar. 26, 2014) and aff'd, 858 N.W.2d 773 (Minn. 2015).

2 Fla.—Owen v. Cheney, 238 So. 2d 650 (Fla. 2d DCA 1970).
N.J.—Zicarelli v. New Jersey State Commission of Investigation, 55 N.J. 249, 261 A.2d 129 (1970), judgment aff'd, 406 U.S. 472, 92 S. Ct. 1670, 32 L. Ed. 2d 234 (1972).

3 Cal.—City of Emeryville v. Cohen, 233 Cal. App. 4th 293, 182 Cal. Rptr. 3d 578 (3d Dist. 2015), review filed, (Feb. 24, 2015).

4 Kan.—Lampe v. City of Leawood, 170 Kan. 251, 225 P.2d 73 (1950).
S.D.—Tripp County v. State, 264 N.W.2d 213 (S.D. 1978).
W. Va.—Wiseman v. Calvert, 134 W. Va. 303, 59 S.E.2d 445 (1950).

5 Fla.—Burnett v. Greene, 97 Fla. 1007, 122 So. 570, 69 A.L.R. 244 (1929).
Mo.—State ex rel. and to Use of Behrens v. Crismon, 354 Mo. 174, 188 S.W.2d 937 (1945).
Wis.—In re Koshkonong Mud Creek Drainage Dist., 197 Wis. 261, 221 N.W. 864 (1928).

6 Kan.—State ex rel. Dix v. Board of Ed., 215 Kan. 551, 527 P.2d 952 (1974).
Or.—Philippi v. Oregon State Bd. of Educ., 245 Or. 446, 422 P.2d 265 (1967).

7 Ind.—Perry Tp., Marion County v. Indianapolis Power & Light Co., 224 Ind. 59, 64 N.E.2d 296 (1946).

Neb.—Neeman v. Nebraska Natural Resources Commission, 191 Neb. 672, 217 N.W.2d 166 (1974).

8 La.—Louisiana Municipal Association v. State, 893 So. 2d 809 (La. 2005).

9 Ala.—Riley v. Joint Fiscal Committee of Alabama Legislature, 26 So. 3d 1150 (Ala. 2009).

Ariz.—Kotterman v. Killian, 193 Ariz. 273, 972 P.2d 606, 132 Ed. Law Rep. 938 (1999).

Cal.—Southern California Edison Company v. Public Utilities Commission, 227 Cal. App. 4th 172, 173 Cal. Rptr. 3d 120 (2d Dist. 2014), as modified on other grounds, (June 18, 2014).

Colo.—In re Interrogatories Submitted by General Assembly on House Bill 04-1098, 88 P.3d 1196 (Colo. 2004).

N.J.—In re Deborah Heart and Lung Center SFY 2009 Charity Care Subsidy Allocation, 417 N.J. Super. 25, 8 A.3d 250 (App. Div. 2010).

10 N.C.—Saine v. State, 210 N.C. App. 594, 709 S.E.2d 379, 267 Ed. Law Rep. 897 (2011).

11 Fla.—Tampa Elec. Co. v. Garcia, 767 So. 2d 428 (Fla. 2000).

**Water quality regulation**

Tex.—FM Properties Operating Co. v. City of Austin, 22 S.W.3d 868 (Tex. 2000).

12 U.S.—Terminal R. Ass'n of St. Louis v. U.S., 266 U.S. 17, 45 S. Ct. 5, 69 L. Ed. 150 (1924).

Kan.—Eudora Development Co. of Kansas v. City of Eudora, 276 Kan. 626, 78 P.3d 437 (2003).

S.D.—Northwestern Public Service Co. v. Cities of Chamberlain, Huron, Mitchell, Redfield, Webster, and Yankton, 265 N.W.2d 867 (S.D. 1978).

As to ratemaking power, generally, see C.J.S., Public Utilities § 22.

13 Ind.—Paul Stieler Enterprises, Inc. v. City of Evansville, 2 N.E.3d 1269 (Ind. 2014).

**Protection of public welfare**

Fla.—Martin v. Adoption of L.M.D., 64 So. 3d 758 (Fla. 3d DCA 2011).

14 Va.—Grosso v. Commonwealth, 180 Va. 70, 21 S.E.2d 728 (1942).

W. Va.—State v. Huber, 129 W. Va. 198, 40 S.E.2d 11, 168 A.L.R. 808 (1946).

15 U.S.—In re Gates Community Chapel of Rochester, Inc., 212 B.R. 220 (Bankr. W.D. N.Y. 1997).

Pa.—Flora v. Luzerne County of Com. of Pennsylvania, 103 A.3d 125 (Pa. Commw. Ct. 2014).

16 W. Va.—Burkhart v. Sine, 200 W. Va. 328, 489 S.E.2d 485 (1997).

**Election procedures**

Ind.—Anderson v. Ivy, 955 N.E.2d 795 (Ind. Ct. App. 2011).

17 Or.—Stanley v. City of Salem, 247 Or. 60, 427 P.2d 406 (1967).

W. Va.—Hutchinson v. Braxton County Court, 100 W. Va. 461, 130 S.E. 654 (1925).

18 Mass.—Trustees of New York, N.H. & H.R. Co. v. City of New Bedford, 315 Mass. 154, 52 N.E.2d 324 (1943).

19 U.S.—U.S. v. Volungus, 595 F.3d 1 (1st Cir. 2010).

Cal.—People v. Gonzalez, 170 Cal. Rptr. 3d 883 (Cal. App. 4th Dist. 2014).

Ind.—Cleer v. State, 929 N.E.2d 218 (Ind. Ct. App. 2010).

Kan.—State v. Todd, 299 Kan. 263, 323 P.3d 829 (2014).

Me.—State v. Gilman, 2010 ME 35, 993 A.2d 14 (Me. 2010).

Tex.—Martinez v. State, 323 S.W.3d 493 (Tex. Crim. App. 2010).

**Fixing penalties for crimes**

Cal.—People v. Feyrer, 48 Cal. 4th 426, 106 Cal. Rptr. 3d 518, 226 P.3d 998 (2010).

**Quintessential legislative function**

Enacting laws, and especially criminal laws, is quintessentially a legislative function.

Fla.—State v. Adkins, 96 So. 3d 412 (Fla. 2012).

**Comparative gravity, classification, and punishment**

Save only as limited by constitutional safeguards, the comparative gravity of offenses and their classification and resultant punishment is for legislative determination.

Alaska—Alexie v. State, 229 P.3d 217 (Alaska Ct. App. 2010).

20 U.S.—Commissioner of Internal Revenue v. Liberty Bank & Trust Co., 59 F.2d 320 (C.C.A. 6th Cir. 1932).

Okla.—State v. Juvenile Division, Tulsa County Dist. Court, 1977 OK CR 49, 560 P.2d 974 (Okla. Crim. App. 1977).

End of Document

# 16 C.J.S. Constitutional Law § 284

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**2. Legislative Encroachment on Judiciary**

**a. Legislative Encroachment on Judiciary, in General**

## § 284. Legislative encroachment on judiciary, generally

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2350 to 2356

**Generally, under the principle of separation of powers, the legislature is prohibited from encroaching on, or unduly burdening or interfering with, the judicial department in its exercise of judicial functions.**

As a general rule, under the principle of separation of powers, the legislature is prohibited from encroaching on, or unduly burdening or interfering with, the judicial department in its exercise of judicial functions[1] and divesting the judiciary of its inherent powers.[2] This rule does not necessarily prohibit the legislature from exercising proper legislative powers in areas that may in some way affect the judicial branch.[3] Thus, a legislative enactment which does not frustrate or interfere with the adjudicative function of the courts does not constitute an impermissible encroachment.[4]

Although there is nothing in the United States Constitution which forbids the legislature of a state to exercise judicial functions,[5] the exercise of judicial functions by the legislature is forbidden, either expressly or by implication, by all the state constitutions now in force except as directed or permitted therein.[6] Any act by which the legislature attempts to exercise authority or usurp

functions properly within the scope of the judicial power is unconstitutional and void.[7] Furthermore, the legislature cannot constitutionally impose upon the judicial branch powers and obligations exclusively reserved to the legislative or executive branch.[8]

The legislature cannot bar or restrict the power of the judiciary to determine questions of law,[9] and the legislative removal of the discretionary component in the adjudicative process is a usurpation of the courts' freedom that is essential to the judiciary's independence from the other two branches.[10] However, the legislature may declare the legal effect of doing certain acts[11] and has the power, by statute, to change the substantive rules upon which courts at law and equity base their decisions.[12]

***Distinction between functions.***

The distinction between the functions of the legislative and the judicial departments is that it is the province of the legislature to establish rules that will regulate and govern in matters or transactions occurring subsequent to the legislative action while the judiciary determines rights and obligations with reference to transactions that are past or conditions that exist at the time of the exercise of judicial power.[13] A "judicial inquiry" investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist while "legislation" looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.[14] Thus, the legislature may enact a statute to modify, for the future, the law as declared by decisions of the courts.[15]

***Consent by judiciary.***

The judiciary cannot consent that its province will be invaded by either of the other departments of the government.[16] In the full enjoyment of its paramount and exclusive powers over the judicial branch, the supreme court has authority, reasonably to be implied under the twin principles of the separation and interdependence of governmental powers, to permit or accommodate the lawful and reasonable exercise of powers of other branches of government even as that might impinge upon the court's constitutional concerns in the judicial area.[17] The constitutional validity of such action by another branch of government, and the court's ultimate power to accept or reject such action, turn upon the legitimacy of the governmental purpose of that action and the nature and extent of its encroachment upon judicial prerogatives and interests.[18]

***Conferring judicial powers.***

It is not within the authority of the legislature to delegate judicial powers to any person or class of persons charged with the performance of duties that are not judicial.[19] However, this rule is not violated by the delegation of power which is other than judicial;[20] or which is quasi-judicial, such as issuing a search warrant;[21] or which involves the exercise of a legislative power, such as taxation.[22]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Congress may not usurp a court's power to interpret and apply the law to the circumstances before it. U.S.C.A. Const. Art. 3, § 1 et seq. Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016).

  

Statute limiting payment to senior-status judges violated Separation of Powers Clause of the state constitution, as it sought to control a function of the judicial system, appointing senior-status judges for temporary service, when the Judicial Reorganization Amendment had expressly given that function exclusively to the Supreme Court of Appeals. W. Va. Const. art. 5, § 1; W. Va. Const. art. 8, §§ 3, 8; W. Va. Code Ann. § 51-9-10. State ex rel. Workman v. Carmichael, 819 S.E.2d 251 (W. Va. 2018).

**[END OF SUPPLEMENT]**



Footnotes

1 U.S.—Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers, 619 F.3d 1289 (11th Cir. 2010).
Cal.—Kerns v. CSE Ins. Group, 106 Cal. App. 4th 368, 130 Cal. Rptr. 2d 754 (1st Dist. 2003).
Ill.—Adair Architects, Inc. v. Bruggeman, 346 Ill. App. 3d 523, 281 Ill. Dec. 938, 805 N.E.2d 306 (3d Dist. 2004).
La.—State v. Cooper, 50 So. 3d 115 (La. 2010).
Mass.—Com. v. Cole, 468 Mass. 294, 10 N.E.3d 1081 (2014).
Nev.—City of Sparks v. Sparks Mun. Court, 302 P.3d 1118, 129 Nev. Adv. Op. No. 38 (Nev. 2013).
**In field committed to control of courts**
The separation-of-powers doctrine is violated only when the functioning of the judicial process in a field constitutionally committed to the control of the courts is interfered with by the executive or legislative branches.
Tex.—In re Dean, 393 S.W.3d 741 (Tex. 2012).

2 U.S.—In re Premises Located at 840 140th Ave. NE, Bellevue, Wash., 634 F.3d 557, 79 A.L.R. Fed. 2d 657 (9th Cir. 2011).
Cal.—Saltonstall v. City of Sacramento, 231 Cal. App. 4th 837, 180 Cal. Rptr. 3d 342 (3d Dist. 2014), as modified on other grounds, (Dec. 18, 2014).
Ill.—Morawicz v. Hynes, 401 Ill. App. 3d 142, 340 Ill. Dec. 893, 929 N.E.2d 544 (1st Dist. 2010).
Tenn.—In re Bell, 344 S.W.3d 304 (Tenn. 2011).
**Judiciary is coequal branch of government**
Fla.—Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004).

3 Cal.—Saltonstall v. City of Sacramento, 231 Cal. App. 4th 837, 180 Cal. Rptr. 3d 342 (3d Dist. 2014), as modified on other grounds, (Dec. 18, 2014).
Ky.—Com., Cabinet for Health and Family Services v. Chauvin, 316 S.W.3d 279 (Ky. 2010).

4 Tenn.—Underwood v. State, 529 S.W.2d 45 (Tenn. 1975).

5 U.S.—Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S. Ct. 67, 53 L. Ed. 150 (1908).

6 Ill.—People v. Cox, 82 Ill. 2d 268, 45 Ill. Dec. 190, 412 N.E.2d 541 (1980).
Pa.—Pennsylvania State Ass'n of Jury Com'rs v. Com., 621 Pa. 360, 78 A.3d 1020 (2013).
R.I.—Lemoine v. Martineau, 115 R.I. 233, 342 A.2d 616 (1975).

7 U.S.—Jensen v. County of Lake, 958 F. Supp. 397 (N.D. Ind. 1997).
Fla.—Military Park Fire Control Tax Dist. No. 4 v. DeMarois, 407 So. 2d 1020 (Fla. 4th DCA 1981).
Wash.—In re Dependency of E.H., 158 Wash. App. 757, 243 P.3d 160 (Div. 2 2010).

8 Pa.—Com. v. Mockaitis, 575 Pa. 5, 834 A.2d 488 (2003).
Tenn.—Heyne v. Metropolitan Nashville Bd. of Public Educ., 380 S.W.3d 715, 286 Ed. Law Rep. 730 (Tenn. 2012).

9 Md.—Criminal Injuries Compensation Bd. v. Gould, 273 Md. 486, 331 A.2d 55 (1975).
N.H.—Cloutier v. State Milk Control Bd., 92 N.H. 199, 28 A.2d 554 (1942).

10 Okla.—Yocum v. Greenbriar Nursing Home, 2005 OK 27, 130 P.3d 213 (Okla. 2005).

11 Ark.—Cupp v. Pocahontas Federal Sav. & Loan Ass'n, 242 Ark. 566, 414 S.W.2d 596 (1967).

12 Mo.—In re Dyer, 163 S.W.3d 915 (Mo. 2005).

13 Ill.—Carolene Products Co. v. McLaughlin, 365 Ill. 62, 5 N.E.2d 447 (1936).

Mich.—In re Manufacturer's Freight Forwarding Co., 294 Mich. 57, 292 N.W. 678 (1940).

14 U.S.—Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S. Ct. 67, 53 L. Ed. 150 (1908).

Kan.—Behrmann v. Public Emp. Relations Bd., 225 Kan. 435, 591 P.2d 173 (1979).

15 Ark.—Federal Exp. Corp. v. Skelton, 265 Ark. 187, 578 S.W.2d 1 (1979).

16 Ga.—Sams v. Olah, 225 Ga. 497, 169 S.E.2d 790 (1969).

Minn.—Sharood v. Hatfield, 296 Minn. 416, 210 N.W.2d 275 (1973).

17 Kan.—Knight v. City of Margate, 86 N.J. 374, 431 A.2d 833 (1981).

18 Kan.—Knight v. City of Margate, 86 N.J. 374, 431 A.2d 833 (1981).

N.J.—In re P.L. 2001, Chapter 362, 186 N.J. 368, 895 A.2d 1128 (2006).

19 Fla.—Gough v. State ex rel. Sauls, 55 So. 2d 111 (Fla. 1951).

Neb.—Nickel v. School Bd. of Axtell, 157 Neb. 813, 61 N.W.2d 566 (1953).

20 Cal.—People v. Wisdom, 47 Cal. App. 3d 482, 120 Cal. Rptr. 745 (4th Dist. 1975).

Ill.—Board of Ed., School Dist. No. 142, Cook County v. Bakalis, 54 Ill. 2d 448, 299 N.E.2d 737 (1973).

N.M.—State v. Mata, 86 N.M. 548, 1974-NMCA-067, 525 P.2d 908 (Ct. App. 1974).

21 La.—State v. Umezulike, 866 So. 2d 794 (La. 2004).

22 Minn.—Wulff v. Tax Court of Appeals, 288 N.W.2d 221 (Minn. 1979).

**End of Document**

# 16 C.J.S. Constitutional Law § 285

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**2. Legislative Encroachment on Judiciary**

**a. Legislative Encroachment on Judiciary, in General**

## § 285. Construction of statutes as judicial function

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2351

**The interpretation of existing statutes is a judicial function with which the legislature cannot interfere; however, the legislature has the power to alter the provisions of existing law by enacting clarifying legislation.**

The interpretation of existing statutes is a judicial function with which the legislature cannot interfere.[1] Since the determination of the true state and meaning of the existing law is not a legislative function,[2] the legislature cannot declare what the law was in the past[3] and cannot impose its own later interpretation of earlier laws on the courts.[4] Statutes granting no new rights but merely construing former enactments are void as an encroachment on the judiciary.[5]

On the other hand, the legislature has the power to alter the provisions of existing law by enacting clarifying legislation.[6] It is as much within the legislative power as the judicial power, subject to constitutional limits other than the separation of powers, for the legislature to declare what its intent was in enacting previous legislation.[7] However, if the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later legislature as to what an earlier

  

legislature intended is entitled to consideration but is not binding or conclusive as to the statute's meaning because it is the task of the judiciary, not the legislature, to interpret a statute.[8]

The legislature may not construe former law so as to give such construction retroactive operation; such statutes are without the sphere of constitutional legislative action insofar as any retrospective operation is concerned.[9] The legislature can neither overturn an interpretation already given by the courts[10] nor bind the latter, with respect to the application of the original statutes to transactions which occurred or rights of action which accrued prior to the passage of the declaratory act.[11]

***Construction embodied in act to be construed.***

A legislative declaration embodied in the act itself as to its construction is binding on the courts.[12] This rule applies, for example, to legislative definitions of terms used in the act.[13] In like manner, the application of a statute may, by its terms, be limited or restricted.[14] However, a legislative declaration of the purpose of a statute is not binding on the courts[15] although in all courts, and certainly in courts of first instance, the legislative declaration of purpose and policy is entitled to gravest consideration and, unless clearly overthrown by facts of record, must prevail.[16]



Footnotes

1 Cal.—Crosby v. HLC Properties, Ltd., 223 Cal. App. 4th 597, 167 Cal. Rptr. 3d 354 (2d Dist. 2014).
D.C.—Tippett v. Daly, 10 A.3d 1123 (D.C. 2010).
Ga.—East Georgia Land and Development Co., LLC v. Baker, 286 Ga. 551, 690 S.E.2d 145 (2010).
S.C.—JRS Builders, Inc. v. Neunsinger, 364 S.C. 596, 614 S.E.2d 629 (2005).
Vt.—State v. Aubuchon, 195 Vt. 571, 2014 VT 12, 90 A.3d 914 (2014).
Wyo.—Sublette County School Dist. Number Nine v. McBride, 2008 WY 152, 198 P.3d 1079, 240 Ed. Law Rep. 401 (Wyo. 2008).
**Administrative rule**
The constitutional duty of the court to interpret the law encompasses the responsibility of deciding whether an administrative rule contradicts the wording of a statute and does not permit the legislature to decide the question.
Idaho—Holly Care Center v. State, Dept. of Employment, 110 Idaho 76, 714 P.2d 45 (1986).

2 U.S.—Walker v. U. S., 83 F.2d 103 (C.C.A. 8th Cir. 1936).
Cal.—Thurman v. Bayshore Transit Management, Inc., 203 Cal. App. 4th 1112, 138 Cal. Rptr. 3d 130 (4th Dist. 2012).
Kan.—Board of Com'rs of Wyandotte County v. General Securities Corporation, 157 Kan. 64, 138 P.2d 479 (1943).

3 Ariz.—State v. Montes, 226 Ariz. 194, 245 P.3d 879 (2011).
Ill.—People v. Clemons, 2012 IL 107821, 360 Ill. Dec. 293, 968 N.E.2d 1046 (Ill. 2012).

4 U.S.—In re Makula, 172 F.3d 493 (7th Cir. 1999).

5 U.S.—Dominick's Finer Foods, Inc. v. Makula, 217 B.R. 550 (N.D. Ill. 1997), judgment aff'd, 172 F.3d 493 (7th Cir. 1999).
Cal.—Del Costello v. State of California, 135 Cal. App. 3d 887, 185 Cal. Rptr. 582 (3d Dist. 1982).
Haw.—Del Rio v. Crake, 87 Haw. 297, 955 P.2d 90 (1998).
Ill.—People v. Clemons, 275 Ill. App. 3d 1117, 212 Ill. Dec. 408, 657 N.E.2d 388 (1st Dist. 1995).

6 Cal.—Hunt v. Superior Court, 21 Cal. 4th 984, 90 Cal. Rptr. 2d 236, 987 P.2d 705 (1999).
As to amending and repealing statutes in this regard, see § 288.
**Clarify ambiguous statute**
The legislature is permitted to clarify an ambiguous statute with a later act without violating the separation-of-powers clause of the constitution.

Ariz.—State v. Rios, 225 Ariz. 292, 237 P.3d 1052 (Ct. App. Div. 1 2010).

7 Conn.—Connecticut Nat. Bank v. Giacomi, 242 Conn. 17, 699 A.2d 101 (1997).

8 Vt.—State v. Aubuchon, 195 Vt. 571, 2014 VT 12, 90 A.3d 914 (2014).

9 Ark.—Federal Exp. Corp. v. Skelton, 265 Ark. 187, 578 S.W.2d 1 (1979).

Tex.—Amplifone Corp. v. Cameron County, 577 S.W.2d 567 (Tex. Civ. App. Corpus Christi 1979).

10 U.S.—In re Brichard Securities Litigation, 788 F. Supp. 1098 (N.D. Cal. 1992).

Ill.—Roth v. Yackley, 77 Ill. 2d 423, 33 Ill. Dec. 131, 396 N.E.2d 520 (1979).

Wash.—Washington State Farm Bureau Federation v. Gregoire, 162 Wash. 2d 284, 174 P.3d 1142 (2007).

11 U.S.—Personal Finance Co. of Braddock v. U.S., 86 F. Supp. 779 (D. Del. 1949).

Kan.—Board of Com'rs of Wyandotte County v. General Securities Corporation, 157 Kan. 64, 138 P.2d 479 (1943).

12 U.S.—Philadelphia Rapid Transit Co v. US, 8 F. Supp. 152 (E.D. Pa. 1934).

**Genuine interpretive legislation**

Genuine interpretive legislation is a recognized function of legislatures in systems of codified laws and is not inherently violative of the principle of separation of powers.

La.—Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 576 (La. 1974).

13 N.C.—Carter v. Carter, 232 N.C. 614, 61 S.E.2d 711 (1950).

S.C.—Windham v. Pace, 192 S.C. 271, 6 S.E.2d 270 (1939).

Va.—Com. v. Whiting Oil Co., 167 Va. 73, 187 S.E. 498 (1936).

14 N.J.—State Board of Assessors v. Plainfield Water Supply Co., 67 N.J.L. 357, 52 A. 230 (N.J. Sup. Ct. 1902).

Tex.—Barnett v. State, 42 Tex. Crim. 302, 62 S.W. 765 (1900).

15 Fla.—City of Daytona Beach v. King, 132 Fla. 273, 181 So. 1, 116 A.L.R. 880 (1938).

W. Va.—State ex rel. City of Charleston v. Sims, 132 W. Va. 826, 54 S.E.2d 729 (1949).

16 U.S.—Hollingsworth v. Federal Min. & Smelting Co., 74 F. Supp. 1009 (D. Idaho 1947); Stephenson v. Binford, 53 F.2d 509 (S.D. Tex. 1931), aff'd, 287 U.S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A.L.R. 721 (1932).

Ariz.—Humphrey v. City of Phoenix, 55 Ariz. 374, 102 P.2d 82 (1940).

**Liberal construction directive given consideration and effect**

Where a directive in a statute commands that such statute be liberally construed to effectuate the purposes thereof, such directive will be given consideration and effect, as indicating legislative purpose and intent, although in the final analysis the courts, and not the legislature, exercise final authority in the construction of statutes.

W. Va.—City of Huntington v. State Water Commission, 135 W. Va. 568, 64 S.E.2d 225 (1951).

**End of Document**

# 16 C.J.S. Constitutional Law § 286

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

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**2. Legislative Encroachment on Judiciary**

**a. Legislative Encroachment on Judiciary, in General**

## § 286. Construction of statutes as judicial function—Construing constitution

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2351

**It is beyond the power of the legislature to place a binding construction on a constitutional provision as such function belongs to the judiciary.**

It is beyond the power of the legislature to place a binding construction on a constitutional provision[1] as such function belongs to the judiciary.[2] Thus, it is the responsibility of the Supreme Court, not Congress, to define the substance of constitutional guarantees,[3] and Congress may not legislatively supersede Supreme Court decisions interpreting and applying the United States Constitution.[4]

Accordingly, an interpretation by the court of a constitutional provision is binding on the legislature.[5] Constitutional interpretations by the courts are incorporated in the instrument itself and are beyond the power of the legislative branch of government to change.[6]

  

Footnotes

1 Mich.—Richardson v. Hare, 381 Mich. 304, 160 N.W.2d 883 (1968).
Ohio—Dublin v. State, 118 Ohio Misc. 2d 18, 2002-Ohio-2431, 769 N.E.2d 436 (C.P. 2002).
Pa.—Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Bd. of Assessment Appeals, 615 Pa. 463, 44 A.3d 3 (2012).
Wash.—Scott Paper Co. v. City of Anacortes, 90 Wash. 2d 19, 578 P.2d 1292 (1978).
**Construing state constitution is function of judiciary**
Ga.—Gwinnett County School Dist. v. Cox, 289 Ga. 265, 710 S.E.2d 773, 268 Ed. Law Rep. 983 (2011).
Mo.—St. Louis County v. River Bend Estates Homeowners' Ass'n, 408 S.W.3d 116 (Mo. 2013).
**Duty of court to interpret constitution**
Ark.—Proctor v. Daniels, 2010 Ark. 206, 392 S.W.3d 360 (2010).
**Judicial power**
Given the final authority of the judicial branch to accord meaning to the language of the constitution, the term "judicial power" in a state constitution cannot ultimately be defined by the legislature any more than "unreasonable searches and seizures" or the "equal protection of the laws" can ultimately be defined by the legislature.
Mich.—National Wildlife Federation v. Cleveland Cliffs Iron Co., 471 Mich. 608, 684 N.W.2d 800 (2004) (overruled on other grounds by, Lansing Schools Educ. Ass'n v. Lansing Bd. of Educ., 487 Mich. 349, 792 N.W.2d 686, 263 Ed. Law Rep. 360 (2010)).

2 § 78.

3 U.S.—Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866, 151 Ed. Law Rep. 35 (2001).

4 U.S.—Dickerson v. U.S., 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

5 Fla.—Sarmiento v. State, 371 So. 2d 1047 (Fla. 3d DCA 1979), decision approved, 397 So. 2d 643 (Fla. 1981).
Mich.—Richardson v. Hare, 381 Mich. 304, 160 N.W.2d 883 (1968).
Wash.—State v. Jones, 182 Wash. 2d 1, 338 P.3d 278 (2014).
As to judicial powers and functions, generally, see §§ 380 to 446.

6 Colo.—People ex rel. Juhan v. District Court for Jefferson County, 165 Colo. 253, 439 P.2d 741 (1968).
**Admissibility of statements made during custodial interrogation**
*Miranda*'s warning-based approach to determining the admissibility of a statement made by the accused during a custodial interrogation was constitutionally based, and could not be in effect overruled by a legislative act, by which Congress sought to reintroduce the old totality-of-circumstances approach and to mandate that as long as the accused's statements were voluntary under all the circumstances of the case, they would be admissible.
U.S.—Dickerson v. U.S., 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).
**Free exercise cases under First Amendment**
By mandating that the courts decide free exercise cases under a compelling interest standard that was previously rejected by the Supreme Court, the Religious Freedom Restoration Act improperly rendered ineffective that portion of the Supreme Court's decision which interpreted the scope and effect of the First Amendment, and therefore, the Act usurped the Supreme Court's authority to determine the scope and meaning of the First Amendment in violation of the separation-of-powers doctrine.
U.S.—Keeler v. Mayor & City Council of Cumberland, 928 F. Supp. 591 (D. Md. 1996).

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## 16 C.J.S. Constitutional Law § 287

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**2. Legislative Encroachment on Judiciary**

**a. Legislative Encroachment on Judiciary, in General**

# § 287. Construction of statutes as judicial function—Constitutionality of statutes

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2351

**The question as to the constitutionality of a statute is not for legislative determination, and a statute, as against a challenge to its validity, cannot stand on legislative declaration alone.**

While the legislature may, in the first instance, determine for itself whether a contemplated act is constitutional,[1] the question as to the constitutionality of a statute is not for legislative determination[2] but is vested in the judiciary.[3] Thus, a statute, as against a challenge to its validity, cannot stand on legislative declaration alone.[4] In other words, a legislator's view about the constitutionality of legislation is not binding on the judiciary, which is the final arbiter on the constitutional issue.[5]



Footnotes

1 Va.—Commonwealth v. Ferries Co., 120 Va. 827, 92 S.E. 804 (1917).

2 U.S.—Norton v. Ashcroft, 298 F.3d 547, 2002 FED App. 0257P (6th Cir. 2002).
Colo.—Woldt v. People, 64 P.3d 256 (Colo. 2003).
Haw.—Alakai Na Keiki, Inc. v. Matayoshi, 127 Haw. 263, 277 P.3d 988, 280 Ed. Law Rep. 450 (2012).
Tex.—Majestic Industries, Inc. v. St. Clair, 537 S.W.2d 297 (Tex. Civ. App. Austin 1976), writ refused n.r.e., (Nov. 17, 1976).

**City ordinances**

The legislative auditor has no statutory or constitutional power or other authority to determine the unconstitutionality of city ordinances, and absent a judicial determination regarding the legality of the ordinances, the auditor must accept their validity.
La.—City of Kenner v. Kyle, 846 So. 2d 34 (La. Ct. App. 5th Cir. 2003).

**Suspension of statute**

The suspension of a statute by the legislature does not constitute an adjudication that such statute is unconstitutional inasmuch as the determination as to constitutionality vests exclusively with the courts.
La.—In re State in Interest of Bogan, 250 So. 2d 191 (La. Ct. App. 1st Cir. 1971).

3 § 204.

4 U.S.—Brown v. W.T. Grant Co., 53 F. Supp. 182 (S.D. N.Y. 1943).
Va.—City of Richmond v. Carneal, 129 Va. 388, 106 S.E. 403, 14 A.L.R. 1341 (1921).

**Legislative declaration not binding**

Cal.—State ex rel. Pension Obligation Bond Committee v. All Persons Interested in Matter of Validity of California Pension Obligation Bonds to Be Issued, 152 Cal. App. 4th 1386, 62 Cal. Rptr. 3d 364 (3d Dist. 2007).

5 Cal.—Corrales v. Bradstreet, 153 Cal. App. 4th 33, 62 Cal. Rptr. 3d 440 (3d Dist. 2007).

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## § 288. Construction of statutes as judicial function—Amending and repealing statutes

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2351

**The enactment of a statute amendatory of a prior statute and not a construction thereof does not constitute an encroachment on the functions of the judiciary.**

If the legislature disapproves of the court's interpretation of a statute, it has the power to amend the statute to make its intention clear.[1] The legislature does not encroach on the judiciary by enacting a statute amendatory of a prior statute and not a construction thereof[2] even though it has the effect of overruling a previous judicial decision.[3] Accordingly, the legislature is not barred from altering a statute so that a judicial interpretation will have no further application.[4]

Statutes amending prior unconstitutional or defective statutes and supplying the defects therein after they have been held unconstitutional are not objectionable as to future operation, and are valid as to past transactions, provided they supply the defects in such prior statutes merely, without assuming to determine the validity of proceedings taken under such statutes.[5] Legislation of this character is a legislative construction of prior statutes, and is valid as far as future operation is concerned, and

  

also as to past transactions if no judicial decrees have been rendered[6] although it is invalid as to past transactions where such decrees have been rendered.[7] In other words, separation-of-powers principles do not preclude the legislature from amending a statute and applying the change to both pending and future cases although any such law cannot readjudicate or otherwise disregard judgments that are already final.[8] Retroactive amendments to the law may violate separation-of-powers by disturbing judgments, interfering with judicial functions, or causing manifest injustice.[9]

Whether a statute is repealed by a subsequent one is not a legislative question, so that it will not apply to pending actions,[10] and a recital in an act that a former statute is repealed or suspended by another is not conclusive on the question of its repeal.[11] Thus, a legislative declaration that a former act will not be deemed repealed by a later one is not conclusive on the courts.[12] In addition, a subsequent legislative recognition of a repealed act does not operate to prevent the repeal.[13] The legislature may limit a repealing act by its own terms[14] or by means of an existing general construction law.[15]



Footnotes

1 Colo.—Pueblo Bancorporation v. Lindoe, Inc., 63 P.3d 353 (Colo. 2003).

2 U.S.—Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers, 619 F.3d 1289 (11th Cir. 2010).
Cal.—Armijo v. Miles, 127 Cal. App. 4th 1405, 26 Cal. Rptr. 3d 623 (2d Dist. 2005).
Or.—Farmers Ins. Co. of Oregon v. Mowry, 350 Or. 686, 261 P.3d 1 (2011).
S.C.—JRS Builders, Inc. v. Neunsinger, 364 S.C. 596, 614 S.E.2d 629 (2005).
Wash.—In re Detention of Savala, 147 Wash. App. 798, 199 P.3d 413 (Div. 3 2008), review denied, 176 Wash. 2d 1001, 297 P.3d 67 (2013).
**Statute which codified decisional law**
Ga.—Douglas County v. Abercrombie, 226 Ga. 39, 172 S.E.2d 419 (1970).

3 Neb.—In re Luckey's Estate, 206 Neb. 53, 291 N.W.2d 235 (1980).

4 U.S.—Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967); Cerro Metal Products v. Marshall, 467 F. Supp. 869 (E.D. Pa. 1979).
Ariz.—Chevron Chemical Co. v. Superior Court, 131 Ariz. 431, 641 P.2d 1275 (1982).

5 Conn.—Enfield Federal Sav. and Loan Ass'n v. Bissell, 184 Conn. 569, 440 A.2d 220 (1981).
Del.—City of Wilmington v. Wolcott, 12 Del. Ch. 379, 112 A. 703 (1921).

6 Iowa—Iowa Savings & Loan Ass'n v. Selby, 111 Iowa 402, 82 N.W. 968 (1900).

7 N.C.—Piedmont Memorial Hospital v. Guilford County, 221 N.C. 308, 20 S.E.2d 332 (1942).

8 Cal.—Armijo v. Miles, 127 Cal. App. 4th 1405, 26 Cal. Rptr. 3d 623 (2d Dist. 2005).

9 Wash.—Lummi Indian Nation v. State, 170 Wash. 2d 247, 241 P.3d 1220 (2010).

10 Ind.—State v. Board of Com'rs of Carroll County, 203 Ind. 23, 178 N.E. 563 (1931).
Nev.—Gill v. Goldfield Consol. Mines Co., 43 Nev. 1, 176 P. 784 (1918), aff'd, 43 Nev. 1, 184 P. 309 (1919).

11 U.S.—U.S. v. Claflin, 97 U.S. 546, 24 L. Ed. 1082, 1878 WL 18337 (1878).

12 Ind.—Pennsylvania Co. v. Dunlap, 112 Ind. 93, 13 N.E. 403 (1887).

13 U.S.—District of Columbia v. Hutton, 143 U.S. 18, 12 S. Ct. 369, 36 L. Ed. 60 (1892).

14 Wis.—Rood v. Chicago, M. & St. P. Ry. Co., 43 Wis. 146, 1877 WL 3671 (1877).

15 N.C.—Epps v. Smith, 121 N.C. 157, 28 S.E. 359 (1897).

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## § 289. Regulation of attorneys and practice of law as judicial function

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2374

**Generally, the legislative branch of government may not interfere with the judicial branch in the reasonable regulation of the practice of law.**

Generally, the legislative branch of government may not interfere with the judicial branch in the reasonable regulation of the practice of law,[1] particularly where such authority is conferred by the constitution on the judiciary.[2] Any attempt by the legislature to control the practice of law would be a violation of the constitutional separation-of-powers doctrine because oversight and control of the practice of law is under the exclusive authority of the judiciary.[3]

While the legislature may prescribe minimum standards for the eligibility of persons desiring to practice law, it is the province of the judiciary ultimately to decide the fitness of those who practice before it and to regulate their activities following their admission to practice.[4] Accordingly, the power to regulate admissions to the bar,[5] and to discipline lawyers for unprofessional conduct,[6] whether conferred by the constitution or inherent in the courts, cannot be taken from them, or encroached on, by the

  

legislature. Thus, the legislative authority may not admit an attorney to practice in the courts of the state or disbar a practicing attorney.[7] Moreover, the legislature cannot authorize laypersons to engage in the practice of law[8] although where such an intrusion on the judicial power with regard to the practice of law by laypersons is minimal and inoffensive, and is intended to aid the aims of the court, the legislation may be upheld as being in aid of the judicial power.[9]

The legislature may not enact statutes relating to the regulation of the practice of law which is the subject of rules adopted by the judicial department.[10] For instance, a statute violates the separation-of-powers clause when it interferes with the ethical duties of attorneys as prescribed by the supreme court.[11] In any event, a statute is unconstitutional which infringes on the court's exclusive power to govern the conduct of an attorney.[12]



Footnotes

1 Kan.—Hays v. Ruther, 298 Kan. 402, 313 P.3d 782 (2013).
Md.—In re Elrich S., 416 Md. 15, 5 A.3d 27 (2010).
N.H.—In re Petition of New Hampshire Bar Ass'n, 151 N.H. 112, 855 A.2d 450 (2004).
Ohio—Cleveland Bar Assn. v. Picklo, 96 Ohio St. 3d 195, 2002-Ohio-3995, 772 N.E.2d 1187 (2002).
Pa.—City of Pittsburgh v. Silver, 50 A.3d 296 (Pa. Commw. Ct. 2012).
W. Va.—Shenandoah Sales & Service, Inc. v. Assessor of Jefferson County, 228 W. Va. 762, 724 S.E.2d 733 (2012).
**Inherent power of supreme court**
No statute is controlling as to the civil regulation of the practice of law; only the supreme court has the inherent power to govern the practice of law.
Ga.—State ex rel. Doyle v. Frederick J. Hanna & Associates, P.C., 287 Ga. 289, 695 S.E.2d 612 (2010).
**Attorney's fees**
A statute providing that fixed attorney's fees were enforceable was an unconstitutional invasion of the authority of the judiciary to regulate the practice of law, which includes the reasonableness of fees.
La.—Gibson v. Burns, 505 So. 2d 66 (La. Ct. App. 4th Cir. 1987).
**A.L.R. Library**
Validity and application of state statute prohibiting judge from practicing law, 17 A.L.R.4th 829.

2 Ark.—Brown v. Kelton, 2011 Ark. 93, 380 S.W.3d 361 (2011).
Mass.—Ellis v. Department of Indus. Accidents, 463 Mass. 541, 977 N.E.2d 49 (2012).
Pa.—Seitzinger v. Com., 25 A.3d 1299 (Pa. Commw. Ct. 2011), aff'd, 617 Pa. 597, 54 A.3d 20 (2012).
**Constitutional amendment removed subject from legislative authority**
Where a constitutional amendment completely removed the subject of admission to the practice and regulation of the legal profession from any legislative authority, a statute subsequently enacted authorizing the court to appoint a board of bar examiners and to organize and govern the bar, and requiring that admission fees be remitted to the state treasury, was void.
Ky.—Ex parte Auditor of Public Accounts, 609 S.W.2d 682 (Ky. 1980).

3 Ark.—Born v. Hosto & Buchan, PLLC, 2010 Ark. 292, 372 S.W.3d 324 (2010).

4 Wis.—State ex rel. Fiedler v. Wisconsin Senate, 155 Wis. 2d 94, 454 N.W.2d 770 (1990).

5 Ga.—Eckles v. Atlanta Technology Group, Inc., 267 Ga. 801, 485 S.E.2d 22 (1997).
Me.—Application of Hughes, 594 A.2d 1098 (Me. 1991).
**Issuing and regulating license to practice law**
Kan.—Hays v. Ruther, 298 Kan. 402, 313 P.3d 782 (2013).
**Number of examinations**
Ala.—Board of Com'rs of Alabama State Bar v. State ex rel. Baxley, 295 Ala. 100, 324 So. 2d 256 (1975).
Tenn.—Belmont v. Board of Law Examiners, 511 S.W.2d 461 (Tenn. 1974).

6 Fla.—Ciravolo v. The Florida Bar, 361 So. 2d 121 (Fla. 1978).
La.—Scott v. Kemper Ins. Co., 377 So. 2d 66 (La. 1979).
Me.—In re Feingold, 296 A.2d 492 (Me. 1972).

**Power given to administrative agency**

Cal.—Hustedt v. Workers' Comp. Appeals Bd., 30 Cal. 3d 329, 178 Cal. Rptr. 801, 636 P.2d 1139 (1981).

**Expression of policy for guidance of judicial department**

Legislative enactments relating to the professional discipline of attorneys serve only as an expression of policy for the guidance of the judicial department in exercising its constitutional prerogative of controlling the practice of law in the Commonwealth.

Mass.—Ellis v. Department of Indus. Accidents, 463 Mass. 541, 977 N.E.2d 49 (2012).

7 Neb.—State ex rel. Johnson v. Childe, 139 Neb. 91, 295 N.W. 381 (1941).

Wash.—State ex rel. Foster v. Washington State Bar Ass'n, 23 Wash. 2d 800, 162 P.2d 261, 160 A.L.R. 1366 (1945).

8 Ill.—Perto v. Board of Review, 274 Ill. App. 3d 485, 210 Ill. Dec. 933, 654 N.E.2d 232 (2d Dist. 1995).

**Workers' compensation proceedings**

Ky.—Turner v. Kentucky Bar Ass'n, 980 S.W.2d 560 (Ky. 1998).

**Corporation could not be represented by nonlawyer**

A statute that allowed a corporation's nonlawyer representative to appeal a decision of the board of equalization and review to a circuit court was unconstitutional as a legislative encroachment on the supreme court of appeals' exclusive authority to define, regulate, and control the practice of law.

W. Va.—Shenandoah Sales & Service, Inc. v. Assessor of Jefferson County, 228 W. Va. 762, 724 S.E.2d 733 (2012).

**Public adjusters could not undertake negotiation settlements**

A statute providing for the licensing of certified public adjusters who could then undertake negotiation settlements between insureds and insurance companies was an unconstitutional violation of the separation-of-powers clause in that it permitted the practice of law by persons not required to be admitted to the bar and not subject to the disciplinary rules of the supreme court.

Ind.—Professional Adjusters, Inc. v. Tandon, 433 N.E.2d 779, 29 A.L.R.4th 1144 (Ind. 1982).

9 § 290.

10 Wash.—Washington State Council of County and City Employees, Council 2, AFSCME, AFL-CIO, Local 87 v. Hahn, 151 Wash. 2d 163, 86 P.3d 774 (2004).

**Qualifications of attorneys**

Ind.—State ex rel. Western Parks, Inc. v. Bartholomew County Court, 270 Ind. 41, 383 N.E.2d 290 (1978).

Mont.—In re Senate Bill No. 630, 164 Mont. 366, 523 P.2d 484 (1974).

**Residency requirements**

Okla.—Archer v. Ogden, 1979 OK 130, 600 P.2d 1223 (Okla. 1979).

11 Fla.—Abdool v. Bondi, 141 So. 3d 529 (Fla. 2014).

**Ethical standards**

The legislature has no power to overrule attorney ethical standards promulgated by the state supreme court.

N.J.—In re City of Newark, 346 N.J. Super. 460, 788 A.2d 776 (App. Div. 2002), also published at, 171 L.R.R.M. (BNA) 2246, 2002 WL 34438385 (N.J. Super. Ct. App. Div. 2002).

12 Pa.—Shaulis v. Pennsylvania State Ethics Com'n, 574 Pa. 680, 833 A.2d 123 (2003).

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## § 290. Regulation of attorneys and practice of law as judicial function—Legislation in aid of judiciary and other suitable purposes

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2374

**While the judicial department has the ultimate power of general control over the practice of law by its own officers, legislation may be enacted in aid of the judicial department.**

While the judicial department has the ultimate power of general control over the practice of law by its own officers, legislation may be enacted in aid of the judicial department and standards of conduct set up by statute.[1] Thus, statutes relating to the practice of law which are merely in aid of, but which do not supersede or detract from, the constitutional power of the judicial department to define, regulate, and control the practice of law do not violate separation-of-powers principles.[2] Note, the courts may acquiesce in the legislative regulation where they have failed to exercise their prerogative to control such matters.[3]

The legislature may assist the judiciary in enforcing and discharging the duty to control the practice of law with appropriate statutory enactments limiting the practice of law to authorized members of the bar.[4] Conversely, where the intrusion on the

  

judicial power with regard to the practice of law by laypersons is minimal and inoffensive, and is intended to aid the aims of the court, the legislation may be upheld as being in aid of the judicial power.[5]

Legislation that has an incidental impact on the practice of law and that does not conflict with the essential mission of regulating the practice of law does not violate the separation-of-powers doctrine.[6] Thus, the legislature has been allowed to enact laws on the subject of the regulation of the practice of law where such laws do not unreasonably encroach on the exclusive right of the courts to adopt such regulation so far as necessary for their protection in carrying out their constitutional functions.[7] It has been found, for instance, that the legislature may impose reasonable limitations and conditions upon access to the courts, and has broad powers to regulate attorney's fees and the attorney-client relationship, so long as a statute does not purport to limit the scope of a court's authority over those matters.[8]

Under various authority, it has been considered not an invasion of the judicial sphere for the legislature to define the practice of law[9] or to impose on attorneys license or occupation taxes for the privilege of practicing in the courts.[10] Likewise, it is not an invasion by the legislative branch of government to authorize the suspension of an attorney pending an appeal from a felony conviction[11] or for the failure to pay assessed contributions to the professional liability fund.[12]

The legislature may also, without invading the sphere of the judicial department, permit public inspection of records pertaining to the professional conduct of attorneys,[13] require the disclosure of information regarding clients and the services rendered to them,[14] make an attorney jointly and severally liable for the cost of court reporter services incurred on behalf of a client,[15] and provide for the licensing and supervision of all persons, including attorneys, engaging in nonlegislative lobbying.[16]



Footnotes

1 Colo.—People v. Buckles, 167 Colo. 64, 453 P.2d 404 (1968).
Conn.—Mrotek v. Nair, 4 Conn. Cir. Ct. 313, 231 A.2d 95 (App. Div. 1967).
**Protection of public interest**
Tex.—Bryant v. State, 457 S.W.2d 72 (Tex. Civ. App. Eastland 1970), writ refused n.r.e., (Nov. 11, 1970).
**Minimum standards**
While the legislature may fix minimum standards of qualifications to be required of attorneys, the supreme court is the final policymaker on the subject.
Cal.—Merco Constr. Engineers, Inc. v. Municipal Court, 21 Cal. 3d 724, 147 Cal. Rptr. 631, 581 P.2d 636 (1978).

2 Ark.—Brown v. Kelton, 2011 Ark. 93, 380 S.W.3d 361 (2011).
**Criminalizing unauthorized practice of law**
(1) The legislature is authorized to determine who may or may not be prosecuted for the unauthorized practice of law.
Minn.—In re Evjen, 653 N.W.2d 212 (Minn. Ct. App. 2002).
(2) A statute criminalizing the unauthorized practice of law did not violate the separation-of-powers doctrine by usurping the authority of the court to regulate the practice of law but rather was simply a defined standard of criminal conduct.
Ind.—Levy v. State, 799 N.E.2d 71 (Ind. Ct. App. 2003).

3 Fla.—Petition of Florida State Bar Ass'n, 134 Fla. 851, 186 So. 280 (1938).
Minn.—Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940).

4 Mass.—Real Estate Bar Ass'n for Massachusetts, Inc. v. National Real Estate Information Services, 459 Mass. 512, 946 N.E.2d 665 (2011).
**Cause of action for unauthorized practice of law**
The supreme court's exclusive jurisdiction over rules regarding the practice of law did not preclude the legislature from creating a cause of action for the unauthorized practice of law by a nonlawyer pursuant to

the Arkansas Deceptive Trade Practices Act; nonlawyers engaging in what the supreme court exclusively defined as the practice of law were beyond the court's purview for purposes of meaningful sanction.

Ark.—Campbell v. Asbury Automotive, Inc., 2011 Ark. 157, 381 S.W.3d 21 (2011).

5 W. Va.—McMahon v. Advanced Title Services Co. of West Virginia, 216 W. Va. 413, 607 S.E.2d 519 (2004).

**Appearance in magistrate court**

A statute authorizing the appearance of parties to civil litigation in a magistrate court by a lay agent is legislation in aid of the goals of the supreme court of appeals and does not unconstitutionally infringe upon the power of the court to regulate the practice of law.

W. Va.—State ex rel. Frieson v. Isner, 168 W. Va. 758, 285 S.E.2d 641 (1981).

6 Kan.—Hays v. Ruther, 298 Kan. 402, 313 P.3d 782 (2013).

7 Or.—Sadler v. Oregon State Bar, 275 Or. 279, 550 P.2d 1218, 83 A.L.R.3d 762 (1976).

**Compensation for court-appointed attorneys**

Kan.—Hays v. Ruther, 298 Kan. 402, 313 P.3d 782 (2013).

N.H.—Smith v. State, 118 N.H. 764, 394 A.2d 834, 3 A.L.R.4th 568 (1978).

**Restriction of dealings of judges with casinos**

N.J.—Knight v. City of Margate, 86 N.J. 374, 431 A.2d 833 (1981).

8 Ill.—In re Marriage of Earlywine, 2013 IL 114779, 374 Ill. Dec. 947, 996 N.E.2d 642 (Ill. 2013).

9 Mo.—Strong v. Gilster Mary Lee Corp., 23 S.W.3d 234 (Mo. Ct. App. E.D. 2000).

10 U.S.—Smith v. Magras, 37 V.I. 464, 124 F.3d 457 (3d Cir. 1997).

Pa.—Cherry v. City of Philadelphia, 547 Pa. 679, 692 A.2d 1082 (1997).

Tenn.—Cox v. Huddleston, 914 S.W.2d 501 (Tenn. Ct. App. 1995).

11 Tex.—Bryant v. State, 457 S.W.2d 72 (Tex. Civ. App. Eastland 1970), writ refused n.r.e., (Nov. 11, 1970).

12 Or.—State ex rel. Robeson v. Oregon State Bar, 291 Or. 505, 632 P.2d 1255 (1981).

13 Or.—Sadler v. Oregon State Bar, 275 Or. 279, 550 P.2d 1218, 83 A.L.R.3d 762 (1976).

14 Mass.—Opinion of the Justices to the Senate, 375 Mass. 795, 376 N.E.2d 810 (1978).

15 N.M.—Trambley v. Wyman, 125 N.M. 13, 1998-NMCA-035, 956 P.2d 144 (Ct. App. 1998).

16 Mont.—State Bar of Montana v. Krivec, 193 Mont. 477, 632 P.2d 707 (1981).

**Registration ordinance**

Ill.—Kavanagh v. County of Will, 293 Ill. App. 3d 880, 228 Ill. Dec. 427, 689 N.E.2d 299 (3d Dist. 1997).

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## § 291. Appointment, removal, and compensation of officers

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2350, 2352, 2355, 2356

**It does not constitute an encroachment on the judiciary for the legislature to authorize the appointment of judicial officers or employees through agencies other than the courts, and to provide for their compensation, and the legislature may exercise power to provide for the removal of public officers or employees for dereliction of duty or other causes.**

The authority conferred on the judiciary to hire, discharge, and supervise the work of court personnel cannot be impaired by another branch of government.[1] However, the legislature may set policies controlling the hiring and firing of nonjudicial officers of the judicial branch.[2] Generally, the fact that the legislature authorizes the executive department[3] or the judicial department[4] to make appointments of officers of the judicial department does not constitute an encroachment on the judiciary except as to such officers and assistants whom the independent exercise of judicial power and the separation of the judicial department from the other departments of the government require to be appointed by the court.[5]

  

A statute which places certain officers or employees under civil service rules does not constitute an encroachment on the judiciary.[6] The legislature may not establish arbitrary exclusions from judicial office or annex qualifications thereto where the constitution has not established such exclusions or annexed such qualifications.[7]

The power to remove a public officer or employee for dereliction of duty or other causes is not essentially a judicial power, and subject to constitutional restrictions, it may be exercised by the legislature or by such other authority as the legislature may designate without encroachment on the judicial branch of the government.[8] Thus, the legislature is not attempting to exercise judicial functions by adding new causes which may produce a vacancy in office.[9] However, where under the constitution the discipline or discharge of a judicial employee is a judicial power, such powers may not be policed, encroached upon, or diminished by the legislative branch.[10]

***Compensation.***

There is vested in the legislative branch the power and authority to set the salary scale for the judiciary.[11] A statute, ordinance, or city charter fixing or authorizing the fixing of salaries of judges,[12] or regulating the compensation of court employees,[13] does not interfere with the jurisdiction of the court, it being a legislative and not a judicial question. However, a statute which authorizes local entities to fix salaries of magistrates is invalid where such matters are within the competence of the courts.[14] Likewise, a statute providing that a judge who does not comply with time limits forfeits a portion of his or her salary for each violation usurps powers which the constitution grants exclusively to the supreme court and conflicts with the constitutional provision whereby a judge's compensation cannot be reduced during the judge's term in office.[15]

**CUMULATIVE SUPPLEMENT**

**Cases:**

While courts have the negative power to disregard an unconstitutional enactment by Congress, they cannot re-write Congress's work by creating offices, terms, and the like; such editorial freedom belongs to the Legislature, not the Judiciary. (Per Chief Justice Roberts, with two justices concurring and four justices concurring in the judgment.) Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020).

**[END OF SUPPLEMENT]**



Footnotes

1 Pa.—Reznor v. Hogue, 63 Pa. Commw. 600, 438 A.2d 1013 (1982).
**Judicial prerogative to regulate judicial officers**
The supreme court may invalidate statutory provisions which intrude on the judicial prerogative to regulate, among other things, judicial officers.
Pa.—Pennsylvania State Ass'n of Jury Com'rs v. Com., 621 Pa. 360, 78 A.3d 1020 (2013).

2 Ill.—Administrative Office of Illinois Courts v. State and Mun. Teamsters, Chauffeurs and Helpers Union, Local 726, 167 Ill. 2d 180, 212 Ill. Dec. 627, 657 N.E.2d 972 (1995).

3 Cal.—Obrien v. Jones, 23 Cal. 4th 40, 96 Cal. Rptr. 2d 205, 999 P.2d 95 (2000).

4 U.S.—U.S. v. Hilario, 218 F.3d 19 (1st Cir. 2000).
**Appointment of probate court administrator**

Because of the limited and purely administrative nature of the duties of the office of probate court administrator, the action of the legislature in creating the office, and in providing that the appointment of a judge to such office should be made by the chief court administrator, was not a fatal infringement of the constitutional mandate of separation of powers.

Conn.—Adams v. Rubinow, 157 Conn. 150, 251 A.2d 49 (1968).

5 Ill.—People ex rel. Vanderburg v. Brady, 275 Ill. 261, 114 N.E. 25 (1916).

Neb.—State ex rel Sorensen v. Mitchell State Bank, 123 Neb. 120, 242 N.W. 283 (1932).

S.C.—Harrison v. Lancaster, 204 S.C. 318, 28 S.E.2d 835 (1944).

**Substitute judges**

Minn.—State ex rel. Thompson v. Day, 200 Minn. 77, 273 N.W. 684 (1937).

**Civil service commission**

Placement in the civil service commission of the control of the incidence of employment of personnel directly connected with the operation of the court is precluded by the doctrine of separation of powers.

Wash.—Massie v. Brown, 9 Wash. App. 601, 513 P.2d 1039 (Div. 1 1973), judgment aff'd, 84 Wash. 2d 490, 527 P.2d 476 (1974).

6 Cal.—Los Angeles County Employees Ass'n, SEIU, Local 660 v. Superior Court, 81 Cal. App. 4th 164, 96 Cal. Rptr. 2d 418 (2d Dist. 2000).

Mich.—Sabbe v. Wayne County, 322 Mich. 501, 33 N.W.2d 921 (1948).

7 Del.—Buckingham v. State ex rel. Killoran, 42 Del. 405, 35 A.2d 903 (1944).

Mich.—Attorney General ex rel. Cook v. O'Neill, 280 Mich. 649, 274 N.W. 445 (1937).

8 Mont.—State ex rel. Holt v. District Court of First Judicial Dist. in and for Lewis and Clark County, 103 Mont. 438, 63 P.2d 1026 (1936).

Ohio—Stebbins v. Rhodes, 56 Ohio St. 2d 239, 10 Ohio Op. 3d 387, 383 N.E.2d 605 (1978).

Utah—Taylor v. Lee, 119 Utah 302, 226 P.2d 531 (1951).

9 Utah—State ex rel. Stain v. Christensen, 84 Utah 185, 35 P.2d 775 (1934).

10 Pa.—Beckert v. American Federation of State, County and Municipal Emp., 56 Pa. Commw. 572, 425 A.2d 859 (1981), decree aff'd by, 501 Pa. 70, 459 A.2d 756 (1983).

**Judicial conduct commission**

Statutes establishing a judicial conduct commission violated the separation of powers, although they did not prohibit the supreme court from reprimanding, censuring, or suspending judges for misconduct, because the legislature usurped the court's essential power to determine when, whether, and to what extent discipline should be imposed.

N.H.—In re Petition of Judicial Conduct Committee, 151 N.H. 123, 855 A.2d 535 (2004).

11 Pa.—Goodheart v. Thornburgh, 118 Pa. Commw. 75, 545 A.2d 399 (1988), order aff'd, 521 Pa. 316, 555 A.2d 1210 (1989), on reconsideration on other grounds, 523 Pa. 188, 565 A.2d 757 (1989).

12 Ga.—Feagin v. Freeney, 192 Ga. 868, 17 S.E.2d 61 (1941).

Wash.—In re Salary of Superior Court Judges, 82 Wash. 623, 144 P. 929 (1914).

**Ceiling on salaries**

Mich.—Deneweth v. Green, 32 Mich. App. 439, 189 N.W.2d 10 (1971).

13 Pa.—Leahey v. Farrell, 362 Pa. 52, 66 A.2d 577 (1949).

**Probation officers**

Ind.—Matter of Madison County Probation Officers' Salaries, 682 N.E.2d 498 (Ind. 1997).

**Fee of appraisers in probate proceedings**

Wash.—In re Crutcher's Estate, 31 Wash. 2d 16, 194 P.2d 964 (1948).

**Collective bargaining**

Allowing court employees to bargain with the county on the question of wages pursuant to a collective bargaining act does not constitute an encroachment on the judiciary's right and power to control and administer its functions.

Wash.—Zylstra v. Piva, 85 Wash. 2d 743, 539 P.2d 823 (1975).

14 S.C.—Douglas v. McLeod, 277 S.C. 76, 282 S.E.2d 604 (1981).

15 La.—Prejean v. Barousse, 107 So. 3d 569 (La. 2013).

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**a. Legislative Encroachment on Judiciary, in General**

## § 292. Appointment and removal of trustees and receivers

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2350, 2352, 2355, 2356

**The power of the judiciary has been held not infringed by statutes providing for the appointment of receivers and trustees.**

Statutes providing for the appointment of a receiver, in certain instances, do not violate constitutional provisions with respect to the separation of the legislative and judicial powers.[1] However, where a cause is properly before a court, the appointment of a receiver constitutes a judicial function without the scope of legislative control, and the legislature is without power to require a court to appoint a designated official as sole receiver.[2]

The power of Congress to empower the comptroller of the currency to appoint receivers for insolvent national banks has been sustained.[3] A similar statute has been sustained by which a state legislature authorizes the bank commissioner to administer the affairs of insolvent banks.[4]

  

Acts appointing and removing trustees are valid as within the scope of legislative power[5] although a statute purporting to direct the courts as to whom to appoint as a successor trustee has been found unconstitutional.[6] An act authorizing trust companies to act as trustees and guardians is constitutional.[7]



Footnotes

1 Ga.—Lawson v. City of Moultrie, 194 Ga. 699, 22 S.E.2d 592 (1942).

2 Neb.—State ex rel Sorensen v. Mitchell State Bank, 123 Neb. 120, 242 N.W. 283 (1932).

3 U.S.—Bushnell v. Leland, 164 U.S. 684, 17 S. Ct. 209, 41 L. Ed. 598 (1897).

4 Mich.—Emmery v. Shinn, 278 Mich. 246, 270 N.W. 284 (1936).

5 Mass.—Ware v. City of Fitchburg, 200 Mass. 61, 85 N.E. 951 (1908).

6 Conn.—Macy v. Cunningham, 140 Conn. 124, 98 A.2d 800 (1953).

7 Minn.—Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7, 41 N.W. 232 (1889).

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## § 293. Legislative adjudications as violating separation of powers

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2352

**An attempt by the legislature to make judicial determinations or adjudicate particular cases legislatively constitutes an improper usurpation of the functions of the judiciary.**

It is not within the power of the legislature to encroach on the functions of the judiciary by making judicial determinations[1] or by adjudicating particular cases legislatively.[2] The legislature violates the separation-of-powers when it applies the law to an existing set of facts, affects the rights of parties to the court's judgment, interferes with any judicial function, or adjudicates facts.[3]

The legislature has no power to indict, try, judge, and punish according to law since such power is plenary in the courts.[4] The legislature cannot usurp judicial powers by excepting one case or one party from the operation of a general rule of law, either as to right or remedy,[5] and cannot suspend the operation of the statute of limitations in a particular case.[6]

  

***Congressional veto of administrative action.***

The congressional disapproval of administrative application of statutory criteria, which in effect renders judicial interpretations of the criteria impermissible advisory opinions, is an interference with the judiciary.[7]

***Charitable trusts.***

A statute which has the effect of changing the trustees and possibly the beneficiaries of a charitable trust, constituting a legislative application of the doctrine of cy pres, violates separation-of-powers principles. The major reason for refusing to authorize the legislature to apply cy pres to charitable trusts is that the existence of the prerequisites for the application of such doctrine is a determination which the courts should make.[8]

***Title to property.***

The legislature cannot adjudicate claims respecting title to property.[9]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Consistent with the limitations established by Article III of the Constitution, Congress could not enact a statute directing that, in "Smith v. Jones," "Smith wins," as such a statute would create no new substantive law but, instead, would direct the court how pre-existing law applies to particular circumstances. U.S.C.A. Const. Art. 3, § 1 et seq. Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016).

**[END OF SUPPLEMENT]**



Footnotes

1 U.S.—In re Brichard Securities Litigation, 788 F. Supp. 1098 (N.D. Cal. 1992).
Cal.—Hunt v. Superior Court, 21 Cal. 4th 984, 90 Cal. Rptr. 2d 236, 987 P.2d 705 (1999).
Wash.—City of Tacoma v. O'Brien, 85 Wash. 2d 266, 534 P.2d 114 (1975).

2 U.S.—Ruiz v. U.S., 243 F.3d 941 (5th Cir. 2001).

3 Wash.—Cornelius v. Washington Dept. of Ecology, 344 P.3d 199 (Wash. 2015).

4 Pa.—In re Investigation by Dauphin County Grand Jury, September, 1938, 332 Pa. 342, 2 A.2d 802 (1938).

5 Okla.—Union School Dist. No. 1 v. Foster Lumber Co., 1930 OK 50, 142 Okla. 260, 286 P. 774 (1930) (overruled on other grounds by, Austin-Western Road Machinery Co. v. Board of Com'rs of Carter County, 1932 OK 332, 160 Okla. 232, 11 P.2d 117 (1932)).

6 Mass.—Holden v. James, 11 Mass. 396, 1814 WL 1043 (1814).

7 U.S.—Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), judgment aff'd, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

8 Mass.—Opinion of the Justices to the House of Representatives, 374 Mass. 843, 371 N.E.2d 1349 (1978).

9 Cal.—Miller v. McKenna, 23 Cal. 2d 774, 147 P.2d 531 (1944).
As to the power of the legislature to enact regulations concerning the disposition and sale of property, see § 294.

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**a. Legislative Encroachment on Judiciary, in General**

## § 294. Disposition or sale of property as subject to legislative regulation

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2353

**Subject to constitutional limitations, the legislature may enact regulations concerning the disposition and sale of property.**

Generally, the legislature may enact regulations concerning the disposition and sale of property.[1] A statute providing for the disposition of property of persons absent and unheard of for a designated period of time is not unconstitutional as an exercise of judicial power.[2]

***Trust estates.***

As a general rule, it is not an encroachment on judicial functions for the legislature to authorize a trustee to sell the real estate constituting the trust in order to provide for the necessities or further the interests of the beneficiary or otherwise to carry out the purpose of the trust.[3]

  

Footnotes

1 Del.—Trustees of New Castle Common v. Gordy, 33 Del. Ch. 334, 93 A.2d 509, 40 A.L.R.2d 544 (1952).

2 Mich.—Walz v. Dawson, 235 Mich. 344, 209 N.W. 177 (1926).

3 Del.—Trustees of New Castle Common v. Gordy, 33 Del. Ch. 334, 93 A.2d 509, 40 A.L.R.2d 544 (1952).

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**a. Legislative Encroachment on Judiciary, in General**

## § 295. Validating or curative acts as valid exercise of legislative power

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2350, 2352, 2376, 2382 to 2385

**Declaratory statutes of a curative nature, enacted for the purpose of curing defects or confirming rights, ordinarily constitute a valid exercise of legislative power and do not encroach on the judiciary; however, a curative act which might be effective prior to final judgment can never be effective to destroy a vested right created by a final judgment.**

To the extent that declaratory statutes are of a curative nature, enacted for the purpose of curing defects or confirming rights, they ordinarily constitute a valid exercise of legislative power as far as the constitutional limitations to encroachment on the judiciary are concerned.[1] Accordingly, statutes validating instruments and transactions, after they have been held invalid by the courts, are a constitutional exercise of legislative authority.[2] The nature and purpose of the act, rather than the fact of pending actions or prior judgments, determines the validity of curative acts except that a curative act which might be effective prior to final judgment can never be effective to destroy a vested right created by a final judgment.[3]

  

***Municipal ordinances, bonds, and contracts.***

The legislature ordinarily may, without encroaching on the judicial power, validate defective municipal ordinances,[4] government bonds,[5] and contracts.[6]

***Claims against government bodies.***

The legislature has the authority to legalize and validate a claim against the federal government, a state, or against a county or municipal corporation, where such claim is supported by a moral obligation or founded in justice,[7] although it has previously been declared invalid by the courts on technical grounds or because of irregularities.[8]

***Taxes and assessments.***

Generally, it is within the power of the legislature to cure irregularities in the assessment, levy, or collection of taxes,[9] such as for public improvements.[10] It has been found that such a statute is valid even as applied to an assessment or collection which has already been adjudged invalid by a court of last resort since the statute in effect imposes a new assessment merely based on the old one.[11] Other authority, however, considers a statute so applied to be an encroachment on the judicial power by reason of the attempted circumvention of a final judgment of the court.[12] A curative act with respect to a void tax deed will not be given effect so as to transfer title to land since the application of such act would sanction a purported judicial determination by the legislature of conflicting rights in real property.[13]



Footnotes

1 U.S.—Paramino Lumber Co. v. Marshall, 309 U.S. 370, 60 S. Ct. 600, 84 L. Ed. 814 (1940).
Iowa—Iowa Elec. Light & Power Co. v. Incorporated Town of Grand Junction, 221 Iowa 441, 264 N.W. 84 (1935).
S.D.—Hodges v. Snyder, 45 S.D. 149, 186 N.W. 867, 25 A.L.R. 1128 (1922), aff'd, 261 U.S. 600, 43 S. Ct. 435, 67 L. Ed. 819 (1923).
As to statutes validating defective judicial proceedings or judgments, see § 310.
**Correcting perceived failing in statute**
A legislative amendment will not be construed as overruling a holding of the court of appeals as that implicates an issue of separation of powers; nonetheless, the General Assembly may enact curative legislation that corrects a perceived failing in a statute or enact certain legislation that negates the holding it perceives to be objectionable as to other cases.
Md.—Johnson v. Mayor and City Council of Baltimore, 203 Md. App. 673, 40 A.3d 475 (2012), judgment aff'd, 430 Md. 368, 61 A.3d 33 (2013).

2 Del.—City of Wilmington v. Wolcott, 12 Del. Ch. 379, 112 A. 703 (1921).
Ill.—Worley v. Idleman, 285 Ill. 214, 120 N.E. 472 (1918).
Iowa—Wilcox v. Miner, 201 Iowa 476, 205 N.W. 847 (1925).

3 S.D.—Alatalo v. Shaver, 45 S.D. 163, 186 N.W. 872 (1922).

4 Del.—City of Wilmington v. Wolcott, 12 Del. Ch. 379, 112 A. 703 (1921).

5 Ill.—Worley v. Idleman, 285 Ill. 214, 120 N.E. 472 (1918).
Mont.—State v. Board of Com'rs of Fergus County, 86 Mont. 595, 285 P. 932 (1930).

6 Iowa—Iowa Elec. Light & Power Co. v. Incorporated Town of Grand Junction, 221 Iowa 441, 264 N.W. 84 (1935).
Pa.—Kennedy v. Meyer, 259 Pa. 306, 103 A. 44 (1918).

7 U.S.—Pope v. U.S., 323 U.S. 1, 65 S. Ct. 16, 89 L. Ed. 3 (1944).

**Authorizing refund of taxes**

Conn.—State v. County Com'rs of Fairfield County, 99 Conn. 378, 121 A. 800 (1923).

Wis.—In re Heinemann's Will, 201 Wis. 484, 230 N.W. 698 (1930).

8 U.S.—U.S. v. Hossmann, 84 F.2d 808 (C.C.A. 8th Cir. 1936).

N.Y.—Wheeler v. State, 190 N.Y. 406, 83 N.E. 54 (1907).

9 Ala.—Bozeman v. Conecuh County Bd. of Ed., 282 Ala. 543, 213 So. 2d 388 (1968).

Ill.—Schlenz v. Castle, 84 Ill. 2d 196, 49 Ill. Dec. 322, 417 N.E.2d 1336 (1981).

Miss.—Yow v. Tishomingo County School Board, 177 Miss. 821, 172 So. 303 (1937).

10 Ark.—Burr v. Beaver Dam Drainage Dist., 145 Ark. 51, 223 S.W. 362 (1920).

11 Md.—Washington Suburban Sanitary Commission v. Noel, 155 Md. 427, 142 A. 634 (1928).

12 Ill.—Chicago & E.I.R. Co. v. People, 219 Ill. 408, 76 N.E. 571 (1905).

13 Cal.—Miller v. McKenna, 23 Cal. 2d 774, 147 P.2d 531 (1944).

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**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**2. Legislative Encroachment on Judiciary**

**a. Legislative Encroachment on Judiciary, in General**

## § 296. Damages and penalties as judicial or legislative functions

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2350, 2352, 2357, 2364

**It is a judicial, and not a legislative, function to ascertain the amount of damages resulting from a breach of a legal duty or from the exercise of the power of eminent domain.**

Generally, it is a judicial, and not a legislative, function to ascertain the amount of damages resulting from a breach of legal duty,[1] and the legislature may not limit a prayer for damages.[2] However, the legislature may make rules concerning the types of damages recoverable and the manner in which damages are paid.[3] Furthermore, statutory caps on noneconomic[4] and punitive[5] damages do not violate the doctrine of separation of powers.

***Property taken under eminent domain.***

In the case of property taken under the valid exercise of the power of eminent domain, it is for the courts, and not the legislature, to determine the amount of damages sustained by the owner.[6] Likewise, the determination of the proper rate of interest, being

  

part of just compensation, is necessarily a judicial function which the legislature may not usurp.[7] However, a statute stating the value of blighted land for the purposes of condemnation is not an unconstitutional invasion of the authority of the judiciary to assess just compensation.[8]

***Administrative award.***

The awarding of compensatory damages by an administrative agency in specified cases is not a usurpation of judicial powers; thus, for instance, a statute allowing a state commission on human rights to award compensatory damages for embarrassment and humiliation in a discrimination case is not an unconstitutional usurpation of judicial powers.[9]

***Penalties.***

The power to conduct a hearing, to determine what the conduct of an individual has been and, in light of that determination, to impose upon him or her a penalty, within limits previously fixed by law, so as to fit the penalty to past conduct so determined and other relevant circumstances is "judicial" in nature, not "legislative."[10] It is not an encroachment on the functions of the judiciary for the legislature to pass a statute reducing or limiting the amount of a statutory penalty recoverable under an existing statute and to make such provision apply to penalties theretofore incurred even though actions are then pending for their recovery.[11] However, a statute is void which prescribes so severe a penalty for its violation as indirectly to preclude a resort to the courts to contest the validity of the statute.[12]



Footnotes

1 Me.—Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371, 59 A. 537 (1904).

2 Ky.—McCoy v. Western Baptist Hospital, 628 S.W.2d 634 (Ky. Ct. App. 1981).

3 Wash.—Ford Motor Co. v. Barrett, 115 Wash. 2d 556, 800 P.2d 367 (1990).

**Manner of payment**

A statute requiring, on request of any party to a medical malpractice action, that future damages be paid in whole or in part in periodic payments if the total amount of damages in the action exceeds $100,000 does not violate the principle of separation of powers; the statute is simply a limitation of a statutorily created remedy.

Mo.—Sanders v. Ahmed, 364 S.W.3d 195 (Mo. 2012).

**Statutory exclusion of certain damages**

The statutory exclusion of certain noneconomic compensatory damages in actions for alienation of affections and criminal conversation did not violate the separation of powers.

Ill.—Murphy v. Colson, 2013 IL App (2d) 130291, 376 Ill. Dec. 489, 999 N.E.2d 372 (App. Ct. 2d Dist. 2013).

4 U.S.—Learmonth v. Sears, Roebuck and Co., 710 F.3d 249 (5th Cir. 2013) (applying Mississippi law).

Alaska—Evans ex rel. Kutch v. State, 56 P.3d 1046 (Alaska 2002).

Md.—Martinez ex rel. Fielding v. The John Hopkins Hosp., 212 Md. App. 634, 70 A.3d 397 (2013), cert. denied, 435 Md. 268, 77 A.3d 1085 (2013).

Mich.—Wessels v. Garden Way, Inc., 263 Mich. App. 642, 689 N.W.2d 526 (2004).

W. Va.—Verba v. Ghaphery, 210 W. Va. 30, 552 S.E.2d 406 (2001).

**Medical malpractice actions**

A statutory cap of $250,000 on noneconomic damages in medical malpractice actions did not unconstitutionally usurp judicial power to grant a remittitur and thus did not violate the separation-of-powers doctrine; the cap was not a statutory remittitur because it was not conditioned on an erroneous verdict, and the legislature could properly regulate the granting of new trials.

Kan.—Miller v. Johnson, 295 Kan. 636, 289 P.3d 1098 (2012).

5 Alaska—Evans ex rel. Kutch v. State, 56 P.3d 1046 (Alaska 2002).

Mo.—Estate of Overbey v. Chad Franklin National Auto Sales North, LLC, 361 S.W.3d 364 (Mo. 2012).
N.C.—Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1 (2004).

**Cap as public policy judgment**

The statutory cap on punitive damages that may be awarded in a civil action did not violate the separation-of-powers doctrine set forth in the state constitution; just as the legislative branch had broad power to limit common-law causes of action and remedies, including punitive damages, the judicial branch had sole authority to apply those limitations to particular cases, and the cap was a public policy judgment that punitive damages in civil cases should not exceed a certain amount.

Ind.—State v. Doe, 987 N.E.2d 1066 (Ind. 2013).

6 U.S.—Schneider v. County of San Diego, 285 F.3d 784 (9th Cir. 2002).
Fla.—Department of Agriculture and Consumer Services v. Bonanno, 568 So. 2d 24 (Fla. 1990).

7 N.Y.—City of Buffalo v. J. W. Clement Co., 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895 (1971).

8 N.J.—Jersey City Redevelopment Agency v. Kugler, 58 N.J. 374, 277 A.2d 873 (1971).

9 Ky.—Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852 (Ky. 1981).

10 N.C.—Kindsgrab v. State Bd. of Barber Examiners, 763 S.E.2d 913 (N.C. Ct. App. 2014).

11 Conn.—Atwood v. Buckingham, 78 Conn. 423, 62 A. 616 (1905).

12 U.S.—Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

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# 16 C.J.S. Constitutional Law § 297

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**2. Legislative Encroachment on Judiciary**

**b. Remedies and Procedure in Regard to Legislative Encroachment on Judiciary**

**(1) Remedies and Procedure in Regard to Legislative Encroachment on Judiciary, in General**

## § 297. Remedies and procedure in regard to legislative encroachment on judiciary, generally

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2357 to 2380

**Subject to the limitation that the legislature may not impair or interfere with the constitutional and inherent powers or efficient functioning of the courts, it may formulate, prescribe, enlarge, modify, alter, and abolish remedies and impose requirements governing matters of procedure.**

The legislature may properly impose requirements governing matters of procedure and the presentation of legal claims.[1] Within constitutional limitations on its right to control the jurisdiction of the courts, the legislature generally has power to formulate, prescribe, enlarge, modify, alter, and abolish remedies[2] and prescribe the terms and conditions on which actions may be brought.[3] The legislature may not, however, under the guise of a statute relating to procedure, attempt to deprive any person of a right secured to the person by the constitution.[4] Notions of fundamental fairness in the context of due process as a constitutional right are matters for determination by the judiciary, not the legislature.[5]

  

The legislature cannot dictate to courts how they should decide matters coming before them judicially[6] or prescribe to the courts a rule of decision.[7] Accordingly, the legislature may not establish a mandatory requirement that the court will enter a certain order, under named conditions in a particular action, in derogation of judicial discretion as to its propriety and necessity[8] or require the courts to register mechanical approval of acts of administrative or executive officers without examination of the legal merits of such acts.[9]

Within the express or implied limitations of the constitution, the legislature, as a general rule, has power reasonably to regulate and control the forms of procedure for the administration of justice in the courts[10] so long as it does not seek to supplant the exercise of sound judicial discretion.[11] The legislature may alter the procedure as it existed at common law.[12] Generally, the legislature may regulate the procedure by which jurisdiction conferred by the constitution may be exercised,[13] equity procedure,[14] and the administration of estates of deceased persons.[15]

On the other hand, to the extent that control over rules of practice and procedure is committed to the courts by the constitution, the legislature may not interfere therewith,[16] and the functions and orderly processes of courts which derive their existence from the constitution may not be disturbed by any legislative enactment.[17] Accordingly, legislative enactments relating to procedure can have no valid operation if they have the effect of depriving the courts of their constitutional or inherent powers[18] as by substantially impairing the constitutional jurisdiction granted[19] or interfering with the discretionary powers of the court in the course of judicial administration,[20] such as the power to fashion remedies.[21]

***Overlapping statutory and court rules.***

Legislative policy and judicial rulemaking powers may overlap to some extent so long as there is no substantial conflict between statute and rule.[22] If a statute is substantive, and not a legislative attempt to regulate the operation of the courts, it will typically not impinge on the court's rulemaking authority.[23] In view of the rule that the legislature may not impede or interfere with the control over practice and procedure which is committed to the courts, as a general rule, in the event of a conflict between a statute and a court rule with regard to a procedural matter, the court rule prevails.[24] On the other hand, statutory rules of procedure are valid to the extent they have been accepted as rules by the courts, or have been acceded to,[25] and procedural statutes are effective until superseded by court rules where the court rules do not address the issue,[26] or there is no conflict between them.[27] In a jurisdiction where there are constitutional courts and legislative courts, the legislative rules override the rules of the legislative courts to the extent of any inconsistency.[28]

**CUMULATIVE SUPPLEMENT**

**Cases:**

When Congress waives sovereign immunity for federal corporations, and even when it goes so far as to waive the corporation's immunity for discretionary functions, its action raises no constitutional separation of powers problems, because the right governmental actor (Congress) is making a decision within its bailiwick (to waive immunity) that authorizes an appropriate body (a court) to render a legal judgment. Thacker v. Tennessee Valley Authority, 139 S. Ct. 1435, 203 L. Ed. 2d 668 (2019).

**[END OF SUPPLEMENT]**

Footnotes

1 Ark.—State v. Lester, 343 Ark. 662, 38 S.W.3d 313 (2001).
Ill.—Ayon ex rel. Ayon v. Balanoff, 308 Ill. App. 3d 900, 242 Ill. Dec. 440, 721 N.E.2d 719 (1st Dist. 1999).
**Legislature has power to create rules governing court procedure**
Wash.—In re Detention of Lane, 182 Wash. App. 848, 332 P.3d 1042 (Div. 1 2014).

2 U.S.—Pope v. U.S., 323 U.S. 1, 65 S. Ct. 16, 89 L. Ed. 3 (1944).
Cal.—Kraus v. Trinity Management Services, Inc., 23 Cal. 4th 116, 96 Cal. Rptr. 2d 485, 999 P.2d 718 (2000).
Va.—Etheridge v. Medical Center Hospitals, 237 Va. 87, 376 S.E.2d 525 (1989).
**Novel methods of judicial procedure**
It is within the constitutional prerogative of the legislature to prescribe and enlarge methods of remedial justice by authorizing novel methods of judicial procedure.
Conn.—Pools by Murphy and Sons, Inc. v. Department of Consumer Protection, 48 Conn. Supp. 248, 841 A.2d 292 (Super. Ct. 2003).
**Conduct of lower federal courts**
Congress may enact laws regulating the conduct of the lower federal courts and the means by which their judgments are enforced.
U.S.—Willy v. Coastal Corp., 503 U.S. 131, 112 S. Ct. 1076, 117 L. Ed. 2d 280, 21 Fed. R. Serv. 3d 1121 (1992).

3 U.S.—Pocono Pines Assembly Hotels Co. v. U.S., 73 Ct. Cl. 447, 1932 WL 2118 (1932).
Minn.—O'Rourke v. O'Rourke, 300 Minn. 158, 220 N.W.2d 811 (1974).
S.D.—Ellis v. Herrick Independent School Dist. No. 36 of Gregory County, 71 S.D. 7, 20 N.W.2d 516 (1945).
**Exhaustion of administrative remedies**
A statutory requirement that an inmate exhaust administrative remedies prior to filing a civil suit did not violate the constitutional provision vesting judicial power exclusively in the courts.
Kan.—Lynn v. Simmons, 32 Kan. App. 2d 974, 95 P.3d 99 (2003).

4 N.H.—State v. Carter, 167 N.H. 161, 106 A.3d 1165 (2014).
R.I.—Lemoine v. Martineau, 115 R.I. 233, 342 A.2d 616 (1975).

5 N.H.—Saviano v. Director, N.H. Div. of Motor Vehicles, 151 N.H. 315, 855 A.2d 1278 (2004).

6 Pa.—Com. v. Knox, 172 Pa. Super. 510, 94 A.2d 128 (1953), judgment aff'd, 374 Pa. 343, 97 A.2d 782 (1953).

7 Ill.—People v. Crawford Distributing Co., 53 Ill. 2d 332, 291 N.E.2d 648 (1972).
Pa.—Com. v. Knox, 172 Pa. Super. 510, 94 A.2d 128 (1953), judgment aff'd, 374 Pa. 343, 97 A.2d 782 (1953).

8 Fla.—State ex rel. Payson v. Chillingworth, 122 Fla. 339, 165 So. 264 (1936).

9 Mass.—In re Opinion of the Justices, 251 Mass. 569, 147 N.E. 681 (1925).

10 Cal.—California Redevelopment Assn. v. Matosantos, 53 Cal. 4th 231, 135 Cal. Rptr. 3d 683, 267 P.3d 580 (2011).
Mo.—State ex rel. Collector of Winchester v. Jamison, 357 S.W.3d 589 (Mo. 2012).
N.Y.—LaSalle Bank, NA v. Pace, 31 Misc. 3d 627, 919 N.Y.S.2d 794 (Sup 2011), order aff'd, 100 A.D.3d 970, 955 N.Y.S.2d 161 (2d Dep't 2012).
As to the power to regulate procedure in criminal cases, generally, see § 298.

11 Okla.—Puckett v. Cook, 1978 OK 108, 586 P.2d 721 (Okla. 1978).

12 Ga.—Dion v. Y.S.G. Enterprises, Inc., 296 Ga. 185, 766 S.E.2d 48 (2014).
Mass.—New Bedford Standard-Times Pub. Co. v. Clerk of Third Dist. Court of Bristol, 377 Mass. 404, 387 N.E.2d 110 (1979).

13 U.S.—In re Beef Industry Antitrust Litigation, 457 F. Supp. 210 (N.D. Tex. 1978).
Neb.—Moser v. Turner, 180 Neb. 635, 144 N.W.2d 192 (1966).

14 Colo.—Cary v. Mine & Smelter Supply Co., 53 Colo. 556, 129 P. 230 (1912).

15 Ohio—In re Johnson's Estate, 27 Ohio Op. 131, 39 Ohio L. Abs. 333, 12 Ohio Supp. 148 (Prob. Ct. 1943).

16 Ark.—C.B. v. State, 2012 Ark. 220, 406 S.W.3d 796 (2012).
Fla.—Abdool v. Bondi, 141 So. 3d 529 (Fla. 2014).

  

Nev.—Borger v. Eighth Judicial Dist. Court ex rel. County of Clark, 120 Nev. 1021, 102 P.3d 600 (2004).
N.M.—Salopek v. Friedman, 2013-NMCA-087, 308 P.3d 139 (N.M. Ct. App. 2013).
Tenn.—Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422 (Tenn. 2011).

17 Ala.—Schoenvogel ex rel. Schoenvogel v. Venator Group Retail, Inc., 895 So. 2d 225 (Ala. 2004).
Neb.—State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982).

18 Ill.—Morawicz v. Hynes, 401 Ill. App. 3d 142, 340 Ill. Dec. 893, 929 N.E.2d 544 (1st Dist. 2010).
Minn.—State v. Lindsey, 632 N.W.2d 652 (Minn. 2001).
Nev.—Berkson v. LePome, 245 P.3d 560, 126 Nev. Adv. Op. No. 46 (Nev. 2010).
Tenn.—State v. Mallard, 40 S.W.3d 473 (Tenn. 2001).

**Discovery**

The control of discovery procedure in cases pending in court is within the court's inherent power, a power so carefully guarded that a statute which encroaches on it is unconstitutional.

Conn.—Rolfe v. New Britain General Hosp., 47 Conn. Supp. 296, 790 A.2d 1194 (Super. Ct. 2001).

**Managing docket**

While the legislature may constitutionally enact statutes relating to judicial procedure, it may not interfere with a trial court's ability to plan and manage its docket.

Ill.—People v. Ramirez, 214 Ill. 2d 176, 291 Ill. Dec. 656, 824 N.E.2d 232 (2005).

**Equitable power**

A trial court's inherent equitable power, derived from the historic power of equity courts, cannot be taken away or abridged by the legislature.

Ill.—Smithberg v. Illinois Mun. Retirement Fund, 192 Ill. 2d 291, 248 Ill. Dec. 909, 735 N.E.2d 560 (2000).

19 Mo.—State ex rel. McPike v. Hughes, 355 Mo. 1022, 199 S.W.2d 405 (1947).
Okla.—Puckett v. Cook, 1978 OK 108, 586 P.2d 721 (Okla. 1978).

20 Conn.—State v. Clemente, 166 Conn. 501, 353 A.2d 723 (1974).
N.Y.—Angela G. v. Roberto G., 98 Misc. 2d 172, 413 N.Y.S.2d 595 (Fam. Ct. 1979).

21 N.Y.—Bethlehem Steel Corp. v. Board of Ed. of City School Dist. of Lackawanna, 44 N.Y.2d 831, 406 N.Y.S.2d 752, 378 N.E.2d 115 (1978).

22 Ariz.—Lear v. Fields, 226 Ariz. 226, 245 P.3d 911 (Ct. App. Div. 2 2011).
Colo.—People v. Bondurant, 2012 COA 50, 296 P.3d 200 (Colo. App. 2012), cert. denied, 2013 WL 120466 (Colo. 2013).

23 Mich.—Zdrojewski v. Murphy, 254 Mich. App. 50, 657 N.W.2d 721 (2002).

24 Ariz.—Lear v. Fields, 226 Ariz. 226, 245 P.3d 911 (Ct. App. Div. 2 2011).
Fla.—Massey v. David, 979 So. 2d 931 (Fla. 2008).
Ill.—In re Marriage of Earlywine, 2013 IL 114779, 374 Ill. Dec. 947, 996 N.E.2d 642 (Ill. 2013).

25 Fla.—Gonzalez v. Badcock's Home Furnishings Center, 343 So. 2d 7 (Fla. 1977).
N.J.—Stroinski v. Office of Public Defender, 134 N.J. Super. 21, 338 A.2d 202 (App. Div. 1975).
N.M.—State v. Herrera, 92 N.M. 7, 1978-NMCA-048, 582 P.2d 384 (Ct. App. 1978).

26 Ind.—State v. Bridenhager, 257 Ind. 699, 279 N.E.2d 794 (1972).

27 Mich.—CAF Inv. Co. v. Saginaw Tp., Saginaw County, 79 Mich. App. 559, 262 N.W.2d 863 (1977), judgment aff'd, 410 Mich. 428, 302 N.W.2d 164 (1981).

28 Conn.—Adams v. Rubinow, 157 Conn. 150, 251 A.2d 49 (1968).

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# 16 C.J.S. Constitutional Law § 298

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.



## § 298. Prosecution, punishment, and sentence for crimes

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2370, 2371

**It is not an encroachment on the functions of the judiciary for the legislature to exercise power to declare what will constitute crime and what will constitute a defense, together with the procedure governing criminal prosecutions; however, the legislature may not interfere with matters within judicial discretion.**

Generally, it is not an encroachment on the functions of the judiciary for the legislature to exercise power to declare what will constitute crime and to prescribe the punishment therefor.[1] The legislature likewise has the power to determine what will constitute a defense,[2] and the length of the statute of limitations for a particular crime,[3] together with the procedure governing criminal prosecutions,[4] including the procedure relating to juvenile offenders.[5] Essentially, a criminal statute that leaves the judiciary free to make its own determination based on the particular facts of a case comports with the separation of powers.[6]

  

The legislature does not have the power to change the procedure established by the constitution[7] or to interfere with matters within judicial discretion.[8] Furthermore, it lacks power to reverse a judgment of the court after conviction and sentence either directly[9] or indirectly,[10] or to increase[11] or mitigate[12] such sentence, or to direct the resentencing of the accused.[13] The legislature does not have the power to direct the disposition of a case to which the jurisdiction of the court has already attached[14] or to interfere with the judicial function of adjudicating the fact of an acquittal.[15]

***Pretrial release and bail.***

The legislature may regulate matters dealing with pretrial release[16] and bail[17] except where the statute conflicts with a court rule conferring discretion on the courts with respect to bail.[18]

***Records.***

The statutory requirement of the destruction or obliteration of arrest records or public records relating to charges of criminal violations does not violate the separation-of-powers doctrine.[19] In addition, the legislature can constitutionally require that a certificate of eligibility be issued prior to the expungement of nonjudicial criminal history records.[20]



Footnotes

1 Conn.—State v. Kalil, 314 Conn. 529, 107 A.3d 343 (2014).
Ind.—Cleer v. State, 929 N.E.2d 218 (Ind. Ct. App. 2010).
Iowa—State v. Wade, 757 N.W.2d 618 (Iowa 2008).
Me.—State v. Gilman, 2010 ME 35, 993 A.2d 14 (Me. 2010).
N.C.—State v. Lewis, 752 S.E.2d 216 (N.C. Ct. App. 2013), review denied, 367 N.C. 322, 755 S.E.2d 617 (2014).
R.I.—Sosa v. State, 949 A.2d 1014 (R.I. 2008).
As to providing that certain acts will constitute conclusive evidence of a violation, see § 301.

2 Ariz.—State v. Casey, 205 Ariz. 359, 71 P.3d 351 (2003).
Tex.—Johnson v. State, 157 S.W.3d 48 (Tex. App. Waco 2004).
**Entrapment**
Fla.—Munoz v. State, 629 So. 2d 90 (Fla. 1993).

3 Cal.—People v. Vasquez, 118 Cal. App. 4th 501, 13 Cal. Rptr. 3d 162 (2d Dist. 2004).
Ill.—People v. Chenoweth, 2015 IL 116898, 388 Ill. Dec. 920, 25 N.E.3d 612 (Ill. 2015).

4 U.S.—Yakus v. U. S., 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).
Mass.—Com. v. Pyles, 423 Mass. 717, 672 N.E.2d 96 (1996).
Nev.—Colwell v. State, 112 Nev. 807, 919 P.2d 403 (1996).
**Burden of proof**
Ariz.—State v. Rios, 225 Ariz. 292, 237 P.3d 1052 (Ct. App. Div. 1 2010).
W. Va.—State v. McWilliams, 177 W. Va. 369, 352 S.E.2d 120 (1986).
**Speedy trial statute**
Kan.—State v. Warren, 224 Kan. 454, 580 P.2d 1336 (1978).
**Diversion program**
Kan.—State v. Greenlee, 228 Kan. 712, 620 P.2d 1132 (1980).
**Rape-shield statute**
Ark.—Nelson v. State, 2011 Ark. 429, 384 S.W.3d 534 (2011).
Colo.—People v. McKenna, 196 Colo. 367, 585 P.2d 275, 1 A.L.R.4th 273 (1978).

5 Cal.—In re Stanley, 62 Cal. App. 3d 71, 131 Cal. Rptr. 608 (2d Dist. 1976).
Ill.—People ex rel. Carey v. Chrastka, 83 Ill. 2d 67, 46 Ill. Dec. 156, 413 N.E.2d 1269 (1980).

**Time for trial**

Fla.—State, Dept. of Health and Rehabilitative Services, Division of Youth Services v. Golden, 350 So. 2d 344 (Fla. 1976).

**Province of legislature**

It is within the legislature's province to decide which prosecutions will be governed by normal criminal laws and which will be governed by juvenile delinquency laws.

Alaska—Nao v. State, 953 P.2d 522 (Alaska Ct. App. 1998).

6 Ariz.—State v. Rios, 225 Ariz. 292, 237 P.3d 1052 (Ct. App. Div. 1 2010).

7 Neb.—State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982).

**Abolition of grand jury**

Pa.—In re Investigation by Dauphin County Grand Jury, September, 1938, 332 Pa. 342, 2 A.2d 804 (1938).

8 Cal.—People v. Engram, 50 Cal. 4th 1131, 116 Cal. Rptr. 3d 762, 240 P.3d 237 (2010).

Colo.—People v. Leahy, 173 Colo. 339, 484 P.2d 778 (1970).

Fla.—Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998).

**Probable cause determination**

A statute providing that certain facts should be accepted by the court as establishing probable cause for the issuance of an arrest warrant is a violation of the separation-of-powers doctrine.

Mich.—City of Birmingham v. 48th Dist. Court Judge, 76 Mich. App. 33, 255 N.W.2d 760 (1977).

**Presentence investigation**

To the extent that a statute attempts to make a presentence investigation report mandatory in all felony cases, the statute unconstitutionally invades the rulemaking province of the court.

Fla.—Huntley v. State, 339 So. 2d 194 (Fla. 1976).

**Setting aside of indictment**

The courts' power to set aside an indictment founded on evidence insufficient as a matter of law to warrant conviction of the crime charged cannot be curtailed or abolished by the legislature.

N.Y.—People v. Frost, 204 Misc. 44, 120 N.Y.S.2d 911 (County Ct. 1953).

9 Ind.—Kunkel v. Moneyhon, 214 Ind. 606, 17 N.E.2d 82 (1938).

Neb.—State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982).

As to particular aspects of sentencing and punishment in this regard, see § 299.

As to interposition in a pending or adjudicated case, generally, see § 309.

10 R.I.—State v. Garnetto, 75 R.I. 86, 63 A.2d 777 (1949).

11 Ind.—Dowd v. Basham, 233 Ind. 207, 116 N.E.2d 632 (1954).

12 Ill.—People ex rel. Cassidy v. McKinley, 372 Ill. 247, 23 N.E.2d 50 (1939).

Nev.—Ex parte Woodburn, 32 Nev. 136, 104 P. 245 (1909).

R.I.—Rose v. State, 92 A.3d 903 (R.I. 2014).

13 Pa.—Com. v. Sutley, 474 Pa. 256, 378 A.2d 780 (1977).

14 Tenn.—State v. Costen, 141 Tenn. 539, 213 S.W. 910 (1919).

15 Neb.—State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982).

16 Ariz.—State ex rel. Purcell v. Superior Court In and For Maricopa County, 107 Ariz. 224, 485 P.2d 549 (1971).

Tex.—Ex Parte Gill, 413 S.W.3d 425 (Tex. Crim. App. 2013).

17 Fla.—Greene v. State, 238 So. 2d 296 (Fla. 1970).

Ill.—People v. Bailey, 167 Ill. 2d 210, 212 Ill. Dec. 608, 657 N.E.2d 953 (1995).

Mich.—Pressley v. Lucas, 30 Mich. App. 300, 186 N.W.2d 412 (1971).

18 Conn.—State v. McCahill, 261 Conn. 492, 811 A.2d 667 (2002).

Fla.—Rolle v. State, 314 So. 2d 624 (Fla. 1st DCA 1975).

Ill.—People ex rel. Stamos v. Jones, 40 Ill. 2d 62, 237 N.E.2d 495 (1968).

19 Cal.—People v. Boyd, 24 Cal. 3d 285, 155 Cal. Rptr. 367, 594 P.2d 484 (1979).

Fla.—Johnson v. State, 336 So. 2d 93 (Fla. 1976).

Tenn.—State v. Doe, 588 S.W.2d 549 (Tenn. 1979).

20 Fla.—R.J.L. v. State, 887 So. 2d 1268 (Fla. 2004).

  

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# 16 C.J.S. Constitutional Law § 299

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**2. Legislative Encroachment on Judiciary**

**b. Remedies and Procedure in Regard to Legislative Encroachment on Judiciary**

**(1) Remedies and Procedure in Regard to Legislative Encroachment on Judiciary, in General**

## § 299. Prosecution, punishment, and sentence for crimes —Particular aspects of sentencing and punishment

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2371

**Legislative regulation of various aspects of the criminal sentencing or punishment process, such as mandatory sentences or the denial of probation or parole, has been upheld as within the separation-of-powers doctrine.**

Legislative regulation of various particular aspects of the criminal sentencing or punishment process is valid where it does not infringe on the power of the judiciary in this respect.[1] A statute does not constitute an infringement on the constitutional division of responsibilities so long as it does not wrest from the courts the final discretion to impose sentence.[2] Any statute which interferes with the discharge of a judicial function of sentencing is not controlling when it conflicts with a rule of procedure regulating sentencing.[3]

  

Accordingly, the courts have upheld the validity of statutes prescribing indeterminate sentences,[4] or requiring mandatory sentences or penalties,[5] such as those requiring a minimum sentence,[6] unless they interfere with the exercise of judicial discretion.[7] Furthermore, the legislature does not usurp the judicial function by the enactment of habitual offender statutes[8] or by making a certain sentence mandatory in the case of a person having a number of prior convictions.[9] Statutes authorizing the removal of prisoners from one institution to another[10] and the revocation of the treatment of a defendant as a juvenile and subsequent confinement as an adult offender[11] have been sustained.

The legislature has the authority to enact statutes which regulate or restrict eligibility for various forms of judicial or executive actions for lessening the severity of punishment,[12] such as parole,[13] or the grant,[14] denial,[15] or revocation[16] of probation. The courts have upheld statutes providing that a period of imprisonment may not be required as a condition of a sentence of probation.[17] Other statutes which have been sustained are those prohibiting suspended sentences, or deferred sentences,[18] or those dealing with the suspension of prosecution, such as by way of pretrial diversion.[19] The legislature is likewise empowered to enact statutes governing the furlough of prisoners and work release programs.[20]

***Presentence investigation.***

A statute may provide for a presentence investigation before imposing a sentence, without usurping a judicial function,[21] except where there are court rules governing such matter.[22]

***Sex offender registration.***

A sexual predator classification subjecting a convicted sex offender to registration and public notification requirements, under a statute based solely on a qualifying conviction for an enumerated sex offense, does not violate the separation-of-powers doctrine by allegedly wresting from the courts the discretion to determine whether the offender should be declared a sexual predator; rather, the statute is a permissible exercise of the public-policy-making function of the legislature.[23]

***Capital punishment.***

A death penalty statute is not unconstitutional on the basis that the statute regulates matters of criminal trial practice and procedure which are exclusively the province of the court in that the aggravating and mitigating circumstances in such statute are substantive law.[24] In addition, the federal and state constitutions do not prohibit the legislature from mandating capital punishment for certain types of first-degree murder notwithstanding any personal views which judges may have on the subject of capital punishment.[25]

***Mental health commitments.***

Determining dispositions in mental health commitments is similar to doing so in criminal prosecutions, which is an area of shared powers between the legislative, executive, and judicial branches.[26]

**CUMULATIVE SUPPLEMENT**

**Cases:**

  

Statute that criminalized cocaine possession while providing for two different mandatory minimum sentences for the same conduct was not an executive usurpation of judicial sentencing powers, as would violate separation-of-powers clause of the Massachusetts Declaration of Rights, but rather represented an appropriate exercise of prosecutorial discretion. Mass. Const. pt. 1, art. 30; Mass. Gen. Laws Ann. ch. 94C, §§ 32A(a), 32A(b), 32A(c), 32A(d). Commonwealth v. Ehiabhi, 478 Mass. 154, 84 N.E.3d 13 (2017).

Statute governing $40 jury fee paid by convicted defendants did not violate the separation-of-powers clause of the State Constitution, since funds collected were deposited into fund referenced in provision of Local Government Code mandating that jury fees be spent for a legitimate criminal justice purpose, which included expenses pertaining to criminal juries. Tex. Loc. Gov't Code Ann. § 113.004(b)(1); Tex. Crim. Proc. Code Ann. art. 102.004. Johnson v. State, 562 S.W.3d 168 (Tex. App. Houston 14th Dist. 2018).

**[END OF SUPPLEMENT]**



Footnotes

1 La.—State v. LeCompte, 406 So. 2d 1300 (La. 1981).
**Scope of judicial discretion subject to congressional control**
U.S.—U.S. v. Acoff, 634 F.3d 200 (2d Cir. 2011).
**Requiring prosecutorial motion**
A statute requiring a prosecutorial motion before district judges may consider a defendant's cooperation with the government as a mitigating factor in sentencing does not violate the separation-of-powers doctrine.
U.S.—U.S. v. Mason, 902 F.2d 1314 (8th Cir. 1990).
**Statutory guidelines**
A statute establishing a set of aggravating and mitigating circumstances to be examined by the court in sentencing was not unconstitutional as invading the power of the judiciary.
Ind.—Carter v. State, 422 N.E.2d 742 (Ind. Ct. App. 1981).

2 N.Y.—People v. Eason, 40 N.Y.2d 297, 386 N.Y.S.2d 673, 353 N.E.2d 587 (1976).

3 Fla.—Rhynes v. State, 312 So. 2d 520 (Fla. 4th DCA 1975).

4 U.S.—Application of Gordon, 157 F.2d 659 (C.C.A. 9th Cir. 1946).
Okla.—Deason v. State, 1978 OK CR 38, 576 P.2d 778 (Okla. Crim. App. 1978).

5 Fla.—Nelson v. State, 811 So. 2d 761 (Fla. 4th DCA 2002).
Ill.—People v. Fernandez, 2014 IL App (1st) 120508, 384 Ill. Dec. 55, 16 N.E.3d 151 (App. Ct. 1st Dist. 2014).
N.H.—State v. Bird, 161 N.H. 31, 8 A.3d 146 (2010).
Ohio—State v. Gonzales, 151 Ohio App. 3d 160, 2002-Ohio-4937, 783 N.E.2d 903 (1st Dist. Hamilton County 2002).
R.I.—Sosa v. State, 949 A.2d 1014 (R.I. 2008).
S.C.—State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002).
**Presumptive sentence**
Presumptive sentencing provisions of a criminal code are not unconstitutional as in violation of the separation-of-powers doctrine because a presumptive sentencing scheme does not foreclose the possibility of placing a person on probation so that it does not foreclose sentences of less than a presumptive sentence.
Alaska—Nell v. State, 642 P.2d 1361 (Alaska Ct. App. 1982).
**Sentencing enhancements**
A statute which limits the trial court's discretion to strike sentence enhancements does not violate the separation-of-powers doctrine.
Cal.—People v. Stiltner, 132 Cal. App. 3d 216, 182 Cal. Rptr. 790 (3d Dist. 1982).

6 U.S.—U.S. v. Paige, 604 F.3d 1268 (11th Cir. 2010).
Del.—State v. Sturgis, 947 A.2d 1087 (Del. 2008).

Idaho—Gibson v. Bennett, 141 Idaho 270, 108 P.3d 417 (Ct. App. 2005).
Mich.—People v. Garza, 469 Mich. 431, 670 N.W.2d 662 (2003).
Va.—Johnson v. Com., 56 Va. App. 244, 692 S.E.2d 651 (2010).

**Compatibility with court rule**

Fla.—State v. Benitez, 395 So. 2d 514 (Fla. 1981).

7 Idaho—State v. McCoy, 94 Idaho 236, 486 P.2d 247 (1971).

8 La.—State v. Dorthey, 623 So. 2d 1276 (La. 1993).
N.J.—State v. Oliver, 298 N.J. Super. 538, 689 A.2d 876 (Law Div. 1996), aff'd, 316 N.J. Super. 592, 720 A.2d 1001 (App. Div. 1998), aff'd, 162 N.J. 580, 745 A.2d 1165 (2000).

9 U.S.—U.S. v. Kaluna, 192 F.3d 1188 (9th Cir. 1999).

10 Ark.—Neal v. State, 180 Ark. 333, 21 S.W.2d 864 (1929).

11 Fla.—Jones v. State, 336 So. 2d 1172 (Fla. 1976).

12 Ariz.—State v. Marquez, 127 Ariz. 98, 618 P.2d 592 (1980).

13 Iowa—State v. Backes, 601 N.W.2d 374 (Iowa Ct. App. 1999).
Kan.—State v. McDaniel, 228 Kan. 172, 612 P.2d 1231 (1980).
N.H.—State v. Farrow, 118 N.H. 296, 386 A.2d 808 (1978).

**Eligibility for parole under juvenile offender statute**

Ariz.—State v. Vera, 235 Ariz. 571, 334 P.3d 754 (Ct. App. Div. 2 2014).

**Electronic monitoring conditions**

U.S.—U.S. v. Peeples, 630 F.3d 1136 (9th Cir. 2010).

**Release date system for parole**

Minn.—State ex rel. Taylor v. Schoen, 273 N.W.2d 612 (Minn. 1978).

14 Cal.—People v. Hess, 107 Cal. App. 2d 407, 237 P.2d 568 (2d Dist. 1951).
Iowa—State v. Wade, 757 N.W.2d 618 (Iowa 2008).

**Increase in amount of monthly probation fee**

Mass.—Doe v. Sex Offender Registry Bd., 459 Mass. 603, 947 N.E.2d 9 (2011).

**Treatment program**

A statute requiring the consent of the defendant's probation officer before a probationer may be granted admission to a treatment program in lieu of prosecution on a subsequent drug charge does not infringe on the court's constitutional right to impose a sentence.

Ill.—People v. Phillips, 66 Ill. 2d 412, 6 Ill. Dec. 215, 362 N.E.2d 1037 (1977).

15 Iowa—State v. Wade, 757 N.W.2d 618 (Iowa 2008).
Kan.—State v. McDaniel, 228 Kan. 172, 612 P.2d 1231 (1980).
Okla.—Draughn v. State, 1975 OK CR 163, 539 P.2d 1389 (Okla. Crim. App. 1975).

16 Ill.—People v. Hammond, 2011 IL 110044, 355 Ill. Dec. 1, 959 N.E.2d 29 (Ill. 2011).

17 Ill.—People v. Cortes, 18 Ill. App. 3d 952, 310 N.E.2d 690 (1st Dist. 1974).

18 Ark.—Tausch v. State, 285 Ark. 226, 685 S.W.2d 802 (1985).
N.M.—State v. Mabry, 1981-NMSC-067, 96 N.M. 317, 630 P.2d 269 (1981).
Okla.—Lehman v. State, 1975 OK CR 118, 536 P.2d 1326 (Okla. Crim. App. 1975).

19 Kan.—State v. Greenlee, 228 Kan. 712, 620 P.2d 1132 (1980).

**Approval of memorandum**

A provision of a pretrial diversion statute mandating approval of a memorandum of understanding by the trial judge except in certain limited situations does not violate the separation-of-powers provision of the constitution since the judiciary is to review such a memorandum for abuse of discretion.

Tenn.—Pace v. State, 566 S.W.2d 861 (Tenn. 1978).

20 Ill.—People v. Williams, 66 Ill. 2d 179, 5 Ill. Dec. 582, 361 N.E.2d 1110 (1977).

21 Okla.—Smith v. State, 1979 OK CR 30, 594 P.2d 784 (Okla. Crim. App. 1979).

22 Fla.—Johnson v. State, 308 So. 2d 127 (Fla. 1st DCA 1975), decision aff'd, 346 So. 2d 66 (Fla. 1977).

23 Fla.—Milks v. State, 894 So. 2d 924 (Fla. 2005).

24 Fla.—Morgan v. State, 415 So. 2d 6 (Fla. 1982).

**Statutory scheme providing for unitary review in death penalty cases**

Colo.—People v. Owens, 228 P.3d 969 (Colo. 2010).

25 Ill.—People v. Bull, 185 Ill. 2d 179, 235 Ill. Dec. 641, 705 N.E.2d 824 (1998).

  

26 Wis.—In re Commitment of Lombard, 2003 WI App 163, 266 Wis. 2d 887, 669 N.W.2d 157 (Ct. App. 2003), decision aff'd, 2004 WI 95, 273 Wis. 2d 538, 684 N.W.2d 103 (2004).

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# 16 C.J.S. Constitutional Law § 300

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**Constitutional Law**
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**(1) Remedies and Procedure in Regard to Legislative Encroachment on Judiciary, in General**

## § 300. Prosecution, punishment, and sentence for crimes—Punishment of contempt

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2375

**The punishment of contempt is within the inherent powers of the court, which cannot be infringed by the legislature, but reasonable regulations can be enacted concerning procedure if they do not unduly restrict the court.**

The punishment of contempt is within the inherent powers of the courts, and generally, the legislature may not encroach on the judiciary by abridging or curtailing the exercise of this power[1] whether by fixing restrictive rules of procedure therefor[2] or prescribing an inadequate penalty.[3] Thus, statutes requiring a jury trial in certain cases of contempt have been found unconstitutional.[4]

On the other hand, the legislature may limit the categories to which contempt orders may apply.[5] In addition, reasonable regulations[6] concerning the procedure to be followed,[7] or the punishment to be imposed,[8] are valid if they do not unduly restrict

the power of the court with respect to these subjects. Furthermore, contempt statutes will be given effect as a matter of comity unless they fetter the efficient operation of the courts or impair their ability to uphold their dignity and authority.[9]

Statutes granting a jury trial for indirect contempt growing out of labor disputes have been upheld as merely a procedural change as to the method of ascertaining the facts.[10] Moreover, the legislature may, without encroaching on the judiciary, provide an additional remedy for the punishment of contempt[11] or authorize the courts to punish particular acts of misconduct as contempt.[12] In any event, any restriction on its action does not preclude the legislature from providing an alternative legislative solution.[13]



Footnotes

1 Ark.—Burradell v. State, 326 Ark. 182, 931 S.W.2d 100 (1996).
Colo.—In Interest of J.E.S., 817 P.2d 508, 70 Ed. Law Rep. 216 (Colo. 1991).
Fla.—Walker v. Bentley, 678 So. 2d 1265 (Fla. 1996).
Ill.—Murneigh v. Gainer, 177 Ill. 2d 287, 226 Ill. Dec. 614, 685 N.E.2d 1357 (1997).
N.M.—Concha v. Sanchez, 2011-NMSC-031, 150 N.M. 268, 258 P.3d 1060, 82 A.L.R.6th 659 (2011).
Wash.—In re Silva, 166 Wash. 2d 133, 206 P.3d 1240 (2009).
**Application of statute**
The section of a statute providing that a newspaper reporter cannot be adjudged in contempt for refusing to disclose the source of information published in a newspaper could not be applied to shield a petitioner from contempt for failure to reveal the names of the attorneys of record in a criminal trial and another person who furnished him with copies of statements disclosing that the defendants planned other murders.
Cal.—Farr v. Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (2d Dist. 1971).

2 Mass.—In re Opinions of the Justices, 314 Mass. 767, 49 N.E.2d 252 (1943).

3 Ky.—Otis v. Meade, 483 S.W.2d 161 (Ky. 1972).
N.H.—In re Opinion of the Justices, 86 N.H. 597, 166 A. 640 (1933).

4 U.S.—In re Atchison, 284 F. 604 (S.D. Fla. 1922).
Wash.—Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 63 P.2d 397 (1936).

5 N.D.—Van Dyke v. Van Dyke, 538 N.W.2d 197 (N.D. 1995).

6 Cal.—Farr v. Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (2d Dist. 1971).
N.M.—Concha v. Sanchez, 2011-NMSC-031, 150 N.M. 268, 258 P.3d 1060, 82 A.L.R.6th 659 (2011).
Wash.—In re Silva, 166 Wash. 2d 133, 206 P.3d 1240 (2009).

7 Colo.—In Interest of J.E.S., 817 P.2d 508, 70 Ed. Law Rep. 216 (Colo. 1991).

8 Iowa—Eicher v. Tinley, 221 Iowa 293, 264 N.W. 591 (1936).
Mo.—State ex rel. Pulitzer Pub. Co. v. Coleman, 347 Mo. 1238, 152 S.W.2d 640 (1941).

9 Alaska—Continental Ins. Companies v. Bayless & Roberts, Inc., 548 P.2d 398 (Alaska 1976).

10 N.Y.—Kronowitz v. Schlansky, 156 Misc. 717, 282 N.Y.S. 564 (Sup 1935).
Pa.—Penn Anthracite Mining Co. v. Anthracite Miners of Pa., 318 Pa. 401, 178 A. 291 (1935).

11 Cal.—In re Morris, 194 Cal. 63, 227 P. 914 (1924).

12 Ill.—People ex rel. Rusch v. Ladwig, 365 Ill. 574, 7 N.E.2d 313 (1937).

13 Ill.—In re Baker, 71 Ill. 2d 480, 17 Ill. Dec. 676, 376 N.E.2d 1005 (1978).

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**(1) Remedies and Procedure in Regard to Legislative Encroachment on Judiciary, in General**

## § 301. Prescribing rules and effect of evidence as legislative or judicial functions

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2362

**While it is within the province of the judiciary, and not the legislature, to determine the facts involved in a controversy and their relevancy, the legislature, as a general rule, has authority to establish, modify, and control rules of evidence to the extent that such rules are not in conflict with the constitution or with rights guaranteed by it.**

Generally, investigation of the facts involved in a controversy and the determination of their relevancy are matters for the judiciary and not the legislature.[1] The legislature cannot determine the weight to be given the evidence,[2] and the facts in a judicial proceeding cannot be determined by legislative fiat.[3] The legislature cannot unduly circumscribe the power of courts to determine facts and apply the law to them[4] or determine the sufficiency of the evidence.[5]

On the other hand, the legislature generally has authority to establish, modify, and control rules of evidence to the extent that such rules are not in conflict with the constitution or with rights guaranteed by it.[6] When it comes to evidentiary rules in matters

not within specialized judicial competence or completely commonplace, it is primarily for Congress to amass the stuff of actual experience and cull conclusions from it.[7] However, the legislature has no constitutional authority to enact rules of evidence that strike at the very heart of a court's exercise of judicial power.[8] In addition, the authority of the legislature to create or to alter rules of evidence is subject to the limitation that the legislature may not, under the guise of creating a rule of evidence, make something "evidence" which is not evidence.[9]

***Witnesses.***

The legislature has the right to control the general competency of witnesses[10] and the subjects of their testimony.[11] The statutory procedure for impeaching a witness does not invade the judicial sphere.[12] It is likewise within the power of the legislature to provide that a grant of immunity to witnesses be conditioned on a request by a public official.[13] While it has been found that privileges are ultimately substantive law, at least those that apply outside the courtroom, and thus are subject to the legislature's exclusive power under the state constitution to enact substantive law,[14] the grant of a testimonial privilege has been found to be in direct conflict with the essential judicial power to compel the production of evidence.[15]



Footnotes

1 Ill.—Durkin v. A. H. Luecht & Co., 379 Ill. 227, 40 N.E.2d 69 (1942).
**Collateral source payments**
A collateral source statute making admissible evidence of collateral source payments in personal injury actions violated the separation-of-powers provisions of the constitution; the responsibility for deciding what evidence is relevant to a determination of medical expenses incurred for the treatment of personal injuries falls squarely within the parameters of practice and procedure assigned to the judicial branch by the constitution.
Ky.—O'Bryan v. Hedgespeth, 892 S.W.2d 571 (Ky. 1995).
**Judicial notice**
A statute requiring the court to take judicial notice of ordinances is unconstitutional as concerning a procedural matter contrary to the procedure previously adopted by the supreme court.
Ind.—Matter of Public Law No. 305 and Public Law No. 309 of Indiana Acts of 1975, 263 Ind. 506, 334 N.E.2d 659 (1975).

2 Haw.—State v. Lowther, 7 Haw. App. 20, 740 P.2d 1017 (1987).
As to matters of proof in this regard, generally, see § 303.
**Judicial power to weigh proof and rule on evidence**
Ohio—Stetter v. R.J. Corman Derailment Servs., L.L.C., 125 Ohio St. 3d 280, 2010-Ohio-1029, 927 N.E.2d 1092 (2010).

3 Ill.—Durkin v. A. H. Luecht & Co., 379 Ill. 227, 40 N.E.2d 69 (1942).

4 Ark.—Davis v. Britt, 243 Ark. 556, 420 S.W.2d 863 (1967).
Ill.—People v. Spegal, 5 Ill. 2d 211, 125 N.E.2d 468, 51 A.L.R.2d 1337 (1955).

5 Haw.—State v. Boehmer, 1 Haw. App. 44, 613 P.2d 916 (1980).
Neb.—State v. Bjornsen, 201 Neb. 709, 271 N.W.2d 839 (1978).

6 U.S.—Dickerson v. U.S., 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).
Ill.—In re Detention of Kortte, 317 Ill. App. 3d 111, 250 Ill. Dec. 514, 738 N.E.2d 983 (2d Dist. 2000).
Me.—Irish v. Gimbel, 1997 ME 50, 691 A.2d 664 (Me. 1997).
Mont.—City of Missoula v. Robertson, 2000 MT 52, 298 Mont. 419, 998 P.2d 144 (2000).
N.H.—In re Southern New Hampshire Medical Center, 164 N.H. 319, 55 A.3d 988 (2012).
Pa.—Com. v. Presley, 455 Pa. Super. 13, 686 A.2d 1321 (1996).
**Hearsay rule**
U.S.—U.S. v. Lynch, 499 F.2d 1011 (D.C. Cir. 1974).

**Rules of evidence peculiarly discretionary with lawmaking authority**

Ga.—Bunn v. State, 291 Ga. 183, 728 S.E.2d 569 (2012).

7 U.S.—Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752, 1 Fed. R. Evid. Serv. 243 (1976).

8 Cal.—Britts v. Superior Court, 145 Cal. App. 4th 1112, 52 Cal. Rptr. 3d 185 (6th Dist. 2006).

Tenn.—State v. Mallard, 40 S.W.3d 473 (Tenn. 2001).

**Legislature cannot infringe on judiciary's power to enact rules**

In order to demonstrate that the legislature infringed upon the judiciary's power to enact evidentiary rules, the appellant must demonstrate that the legislation contradicts or is an attempt to supersede an existing evidentiary rule.

Ohio—State v. Mason, 2013-Ohio-2612, 994 N.E.2d 36 (Ohio Ct. App. 11th Dist. Portage County 2013).

**Court's power to adopt rules of procedure**

The bulk of the rules of evidence are procedural and subject to the supreme court's power to adopt rules of procedure and practice.

Ky.—Com., Cabinet for Health and Family Services v. Chauvin, 316 S.W.3d 279 (Ky. 2010).

9 Pa.—Phillips v. Unemployment Compensation Board of Review, 152 Pa. Super. 75, 30 A.2d 718 (1943).

10 Colo.—In re Lopata's Estate, 641 P.2d 952 (Colo. 1982).

Pa.—Com. v. Newman, 534 Pa. 424, 633 A.2d 1069 (1993).

11 Wash.—Campbell v. Campbell, 146 Wash. 478, 263 P. 957 (1928).

12 Colo.—People v. Mulligan, 193 Colo. 509, 568 P.2d 449 (1977).

13 Cal.—In re Weber, 11 Cal. 3d 703, 114 Cal. Rptr. 429, 523 P.2d 229 (1974).

14 Ky.—Com., Cabinet for Health and Family Services v. Chauvin, 316 S.W.3d 279 (Ky. 2010).

**Privilege to refuse to testify**

A statute that stated that no medical-care provider could be required to give expert testimony against him- or herself in any action for medical injury did not violate the separation of powers; the statute simply created a privilege for the purposes of trial by giving medical-care providers, or their representatives, the privilege to refuse to offer expert testimony in medical malpractice actions.

Ark.—Bedell v. Williams, 2012 Ark. 75, 386 S.W.3d 493 (2012).

15 Wash.—Cook v. King County, 9 Wash. App. 50, 510 P.2d 659 (Div. 1 1973).

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# 16 C.J.S. Constitutional Law § 302

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**2. Legislative Encroachment on Judiciary**

**b. Remedies and Procedure in Regard to Legislative Encroachment on Judiciary**

**(1) Remedies and Procedure in Regard to Legislative Encroachment on Judiciary, in General**

## § 302. Prescribing rules and effect of evidence as legislative or judicial functions—Admissibility of evidence

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2362

**While the legislature generally has the power to ordain that evidence of a certain character will be admissible or inadmissible, the legislature cannot create a statutory rule that conflicts with or tends to engulf a general rule of admissibility adopted by the court pursuant to its exclusive power to make evidentiary rules.**

The legislature generally has the power to ordain that evidence of a certain character will be admissible[1] or inadmissible.[2] Thus, it is perfectly proper for the legislature to provide by statute that certain evidence, although relevant, will be inadmissible for reasons of public policy.[3]

  

On the other hand, the legislature cannot create a statutory rule that conflicts with or tends to engulf a general rule of admissibility adopted by the court pursuant to its exclusive power to make evidentiary rules.[4] In this connection, the requirement of expert medical testimony in medical-negligence cases has been considered a usurpation of the judicial prerogative.[5]



Footnotes

1 Mass.—Com. v. Bradway, 62 Mass. App. Ct. 280, 816 N.E.2d 152 (2004).
Mich.—People v. Watkins, 491 Mich. 450, 818 N.W.2d 296 (2012).
Mont.—State v. Weldele, 2003 MT 117, 315 Mont. 452, 69 P.3d 1162 (2003) (holding modified on other grounds by, State v. Maine, 2011 MT 90, 360 Mont. 182, 255 P.3d 64 (2011)).
Neb.—In re Interest of Constance G., 254 Neb. 96, 575 N.W.2d 133 (1998).
**Evidence from radar or other speed-measuring device**
Minn.—State v. Ali, 679 N.W.2d 359 (Minn. Ct. App. 2004).
**Medical malpractice panel**
(1) The requirement of a medical malpractice act that a medical panel opinion be admitted in evidence was not a usurpation of the judicial authority of courts to rule upon the admissibility of evidence.
Ind.—Kranda v. Houser-Norborg Medical Corp., 419 N.E.2d 1024 (Ind. Ct. App. 1981).
(2) A statute which provides for the admissibility at any subsequent trial of a medical malpractice panel's recommendation, under which the jury remains the ultimate arbiter of factual questions raised at trial, with the panel's recommendation in effect an expert opinion to be evaluated by the jury under instructions of the trial justice, merely constitutes an amendment to the rules of evidence and was within the legislature's powers.
N.Y.—Comiskey v. Arlen, 55 A.D.2d 304, 390 N.Y.S.2d 122 (2d Dep't 1976), judgment aff'd, 43 N.Y.2d 696, 401 N.Y.S.2d 200, 372 N.E.2d 34 (1977).
**Polygraph evidence by stipulation**
A rule allowing the admission of polygraph evidence only by stipulation of the parties does not result in permitting the government to usurp the judicial function of determining the admissibility of evidence.
Iowa—State v. Conner, 241 N.W.2d 447 (Iowa 1976).

2 N.J.—Rybeck v. Rybeck, 141 N.J. Super. 481, 358 A.2d 828 (Law Div. 1976).
N.M.—State v. Herrera, 92 N.M. 7, 1978-NMCA-048, 582 P.2d 384 (Ct. App. 1978).

3 Cal.—People v. Belleci, 24 Cal. 3d 879, 157 Cal. Rptr. 503, 598 P.2d 473 (1979).

4 Ariz.—Lear v. Fields, 226 Ariz. 226, 245 P.3d 911 (Ct. App. Div. 2 2011).
Wash.—Diaz v. State, 175 Wash. 2d 457, 285 P.3d 873 (2012).
**Evidence of prior sex offenses**
The statute permitting the admission of evidence of a defendant's commission of other prior sex offenses in a subsequent criminal prosecution for a sex offense violated the separation-of-powers doctrine; the statute irreconcilably conflicted with the rule of evidence categorically barring the introduction of evidence of prior misconduct for the purpose of showing the defendant's character and action in conformity with that character, there were no exceptions to that rule of evidence, and the admissibility of evidence in a criminal case was a procedural, rather than a substantive, matter.
Wash.—State v. Gresham, 173 Wash. 2d 405, 269 P.3d 207 (2012).
**Judicial officers applying rules are final arbiters**
Judicial officers applying the rules of evidence remain the final arbiters of the admissibility of evidence in a legal proceeding, not the legislature.
W. Va.—State ex rel. Marshall County Com'n v. Carter, 225 W. Va. 68, 689 S.E.2d 796 (2010).
**Field sobriety tests**
A statute providing that standardized field sobriety tests may serve as evidence, in a prosecution for operating a vehicle while under the influence of alcohol, if the officer administered the tests in substantial compliance with generally accepted testing standards, violated a constitutional provision granting the court exclusive rulemaking authority on procedural matters; the legislative enactment was in conflict with a court

decision implicitly interpreting a rule of evidence requiring expert testimony to be reliable as requiring strict compliance with generally accepted testing standards for field sobriety tests.

Ohio—State v. Weiland, 127 Ohio Misc. 2d 138, 2004-Ohio-2240, 808 N.E.2d 930 (Mun. Ct. 2004).

5 N.D.—Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (rejected on other grounds by, Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc., 265 Neb. 918, 663 N.W.2d 43 (2003)).

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# 16 C.J.S. Constitutional Law § 303

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## § 303. Prescribing rules and effect of evidence as legislative or judicial function—Matters of proof

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2362

**The legislature generally has the power to prescribe methods of proof; it can establish presumptions, declare what will be prima facie evidence, and regulate the burden of proof.**

Generally, the legislature has the power to prescribe methods of proof.[1] The legislature is authorized to establish presumptions[2] and the effect to be given thereto.[3] Note, while irrebuttable presumptions can constitute a violation of the principle of separation of powers, when there is a natural and rational relation between the fact proved and the fact presumed, and the inferential process is not purely arbitrary or wholly unreasonable, legislatively mandated presumptions will not be deemed in conflict with the separation-of-powers doctrine.[4]

  

In addition, the legislature may declare what will be prima facie evidence, in both civil and criminal proceedings,[5] provided the facts to be proved fairly relate to, and have a natural[6] or rational[7] connection with, the proposition to be inferred therefrom, and the statute furnishes some guide or test stating the facts necessary to constitute the prima facie case, leaving it to the court to decide whether such facts have been proven.[8]

The legislature may also regulate the burden of proof[9] and the extent thereof required.[10] A burden of proof defines and regulates the party's right to recovery and, therefore, constitutes substantive law that a legislature has the authority to create, pursuant to the constitutional principle of separation of powers.[11]

Generally, the legislature may not provide that certain evidence will be conclusive since this would be to usurp the power of the judiciary.[12] However, the power of the legislature to prescribe what will constitute conclusive evidence in particular instances has been upheld in a number of cases, expressly or impliedly on the theory that such action does not fix a rule of evidence but only a rule of substantive law.[13] While the legislature cannot make that a fact which in truth is not a fact, it has the right to decree what the legal effect is of certain acts even if the party committing such acts had no intention or desire to create such a legal effect.[14]

***Tax deed.***

The legislature cannot, as to a pending case, make a tax deed prima facie evidence of title and of the matters recited in the deed.[15] Generally, however, the legislature may make a tax deed prima facie evidence of title and of the matters recited in the deed[16] and may even make it conclusive evidence that the proceedings are free from irregularities[17] and that directory and nonjurisdictional requirements have been met.[18] The legislature cannot make a tax deed conclusive evidence of jurisdictional matters that are essential to the exercise of the taxing power,[19] and a statute making a tax deed conclusive evidence of a complete title and precluding the original owner from raising the question of jurisdictional defects therein is void.[20]



Footnotes

1 Ill.—People v. Williams, 220 Ill. App. 3d 297, 163 Ill. Dec. 277, 581 N.E.2d 228 (1st Dist. 1991).
Kan.—Ward's Estate v. State Dept. of Social Welfare, 176 Kan. 614, 272 P.2d 737 (1954).
**Proof of status as licensed attorney**
Ill.—People ex rel. Chicago Bar Ass'n v. Novotny, 386 Ill. 536, 54 N.E.2d 536 (1944).

2 Ark.—Stone v. State, 254 Ark. 1011, 498 S.W.2d 634 (1973).
Or.—Marquam Inv. Corp. v. Beers, 47 Or. App. 711, 615 P.2d 1064 (1980).
**Rebuttable presumption for breath-test machines**
Ohio—State v. Rouse, 2012-Ohio-5584, 983 N.E.2d 845 (Ohio Ct. App. 11th Dist. Portage County 2012).
**Speed-measuring device timely tested and working properly**
Fla.—State v. McEldowney, 99 So. 3d 610 (Fla. 5th DCA 2012).
**Substantive law**
The legislative enactment of a positive rule of substantive law, if otherwise constitutional, is not rendered invalid because expressed as a right conclusively presumed.
R.I.—Cataldo v. Admiral Inn, Inc., 102 R.I. 1, 227 A.2d 199 (1967).
**Presumption of accurate impairment rating**
A statute providing that, in workers' compensation cases, a written opinion as to the permanent impairment rating given by an independent medical examination (IME), pursuant to the medical impairment rating (MIR) process, will be presumed to be the accurate impairment rating did not impermissibly conflict with the Rules of Evidence governing the admission of expert testimony and, thus, did not intrude upon the trial court's

judicial powers to make specific findings of fact as to the applicable rating; the statute merely limited the application of the MIR process in certain circumstances, the presumption applied only to the opinion of an MIR physician as to the degree of medical impairment, and nothing prevented the trial court from admitting, considering, and weighing all relevant evidence that could be submitted by an employee or employer to rebut the statutory presumption.

Tenn.—Mansell v. Bridgestone Firestone North American Tire, LLC, 417 S.W.3d 393 (Tenn. 2013).

3 Mont.—Lewis v. New York Life Ins. Co., 113 Mont. 151, 124 P.2d 579 (1942).

4 R.I.—State v. Germane, 971 A.2d 555 (R.I. 2009).

5 Ark.—Stone v. State, 254 Ark. 1011, 498 S.W.2d 634 (1973).

Fla.—Genung v. Nuckolls, 292 So. 2d 587 (Fla. 1974).

Ohio—Ohio Power Co. v. Diller, 18 Ohio App. 2d 167, 47 Ohio Op. 2d 292, 247 N.E.2d 774 (3d Dist. Putnam County 1969).

6 Ark.—Stone v. State, 254 Ark. 1011, 498 S.W.2d 634 (1973).

Ohio—State v. Smith, 8 Ohio Misc. 148, 37 Ohio Op. 2d 220, 221 N.E.2d 627 (Mun. Ct. 1966).

7 U.S.—Owens v. Roberts, 377 F. Supp. 45 (M.D. Fla. 1974).

N.C.—State ex rel. North Carolina Milk Commission v. National Food Stores, Inc., 270 N.C. 323, 154 S.E.2d 548 (1967).

Ohio—State v. Smith, 8 Ohio Misc. 148, 37 Ohio Op. 2d 220, 221 N.E.2d 627 (Mun. Ct. 1966).

R.I.—Cataldo v. Admiral Inn, Inc., 102 R.I. 1, 227 A.2d 199 (1967).

8 Ill.—Schireson v. Walsh, 354 Ill. 40, 187 N.E. 921 (1933).

9 Ariz.—Seisinger v. Siebel, 220 Ariz. 85, 203 P.3d 483 (2009).

Colo.—Borer v. Lewis, 91 P.3d 375 (Colo. 2004).

Minn.—F-D Oil Co., Inc. v. Commissioner of Revenue, 560 N.W.2d 701 (Minn. 1997).

10 N.J.—Garden State Development Co. v. Markowitz, 47 N.J. 1, 218 A.2d 857 (1966).

11 Ark.—Broussard v. St. Edward Mercy Health System, Inc., 2012 Ark. 14, 386 S.W.3d 385 (2012).

12 Haw.—State v. Lowther, 7 Haw. App. 20, 740 P.2d 1017 (1987).

Idaho—Sun Ray Drive-In Dairy, Inc. v. Trenhaile, 94 Idaho 308, 486 P.2d 1021 (1971).

Ill.—First Nat. Bank of Chicago v. King, 165 Ill. 2d 533, 209 Ill. Dec. 199, 651 N.E.2d 127 (1995).

13 Ill.—Palmer House Co. v. Industrial Commission, 388 Ill. 542, 58 N.E.2d 595 (1944).

Kan.—State v. Dobson, 140 Kan. 445, 37 P.2d 10 (1934).

Ohio—Dunn v. State, 122 Ohio St. 431, 8 Ohio L. Abs. 387, 172 N.E. 148 (1930).

14 N.Y.—Central Sur. & Ins. Corp. v. Marro, 189 Misc. 823, 71 N.Y.S.2d 815 (Sup 1947).

15 § 309.

16 N.M.—Kreigh v. State Bank of Alamogordo, 1933-NMSC-049, 37 N.M. 360, 23 P.2d 1085 (1933).

17 Wis.—Smith v. Smith, 19 Wis. 615, 1865 WL 2067 (1865).

18 Md.—Gathwright v. Mayor and Council of City of Baltimore, 181 Md. 362, 30 A.2d 252, 145 A.L.R. 590 (1943).

19 Cal.—Roma v. Elbert, Limited, 73 Cal. App. 2d 338, 166 P.2d 294 (2d Dist. 1946).

20 Md.—Gathwright v. Mayor and Council of City of Baltimore, 181 Md. 362, 30 A.2d 252, 145 A.L.R. 590 (1943).

Okla.—Wilson v. Wood, 1900 OK 87, 10 Okla. 279, 61 P. 1045 (1900).

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## § 304. Regulating appeals as legislative or judicial function

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2356, 2372

**The legislature generally has the power to prescribe the particular causes and proceedings in which an appeal may lie and to impose such reasonable regulations, conditions, and restrictions on an appeal as it may see fit; however, the legislature may not control the exercise of power or discretion of the courts with respect to matters which have been entrusted to them by the constitution.**

Subject to constitutional restrictions on the authority of the legislature to control or impair the jurisdiction of courts, the legislature generally has the power to prescribe the particular causes and proceedings in which an appeal may lie.[1] The legislature has the power to limit the right of appeal.[2] Thus, the legislature has the power to impose such reasonable regulations, conditions, and restrictions on an appeal as it may see fit,[3] such as with respect to appellate procedure[4] and the particular errors or matters that are reviewable.[5] Accordingly, statutes restricting review to questions of law,[6] determining the point at which a matter

  

becomes appealable,[7] requiring a trial de novo in certain types of cases,[8] or permitting the court to reverse, affirm, or modify final orders of the trial court, with or without retrial,[9] have been held constitutional.

On the other hand, the legislature may not control appellate procedure where this power has been withheld from it by the constitution.[10] In addition, the legislature may not control the exercise of power or discretion of the courts in regard to matters which have been entrusted to them by the constitution[11] or the control of which is essential to the independence of the judiciary.[12] Accordingly, the legislature may not deprive a litigant of a right of review granted by the constitution;[13] directly or indirectly abridge the constitutional power and duty of appellate courts to review verdicts on the facts as well as on the law;[14] impair the judicial review of legal questions;[15] attempt to make nonfinal judgments appealable;[16] confer on an appellate court, limited to resolving errors of law, discretionary factual authority;[17] or abrogate a constitutional provision limiting the court to the review of questions of law in a criminal case.[18]

***Limiting time for exceptions and appeals.***

The legislature may limit the time for taking appeals,[19] issuing writs of error,[20] and granting reviews of invalid or erroneous judgments and other proceedings[21] and may establish the detail of when the time will commence to run.[22]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Congress may not vest review of the decisions of Article III courts in officials of the Executive Branch. U.S.C.A. Const. Art. 3, § 1 et seq. Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016).

**[END OF SUPPLEMENT]**



Footnotes

1 Haw.—In re Hawaiian Land Co., 53 Haw. 45, 487 P.2d 1070 (1971).
Nev.—Gary v. Sheriff, Clark County, 96 Nev. 78, 605 P.2d 212 (1980).
N.M.—Ammerman v. Hubbard Broadcasting, Inc., 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354 (1976).
Tex.—Walker v. State, 537 S.W.2d 36 (Tex. Crim. App. 1976).
**Legislature may regulate mode of appellate review**
Cal.—People v. Mena, 54 Cal. 4th 146, 141 Cal. Rptr. 3d 469, 277 P.3d 160 (2012).
**Legislature has plenary power over appellate jurisdiction**
Miss.—Dialysis Solutions, LLC v. Mississippi State Dept. of Health, 96 So. 3d 713 (Miss. 2012).

2 Tex.—Woodlands Plumbing Co., Inc. v. Rodgers, 47 S.W.3d 146 (Tex. App. Texarkana 2001).

3 Ala.—Odom v. Jeffords, 281 Ala. 512, 205 So. 2d 591 (1967).
Conn.—City of Hartford v. Public Utilities Commission, 30 Conn. Supp. 299, 312 A.2d 316 (C.P. 1973).
Ga.—Hancock v. Board of Tax Assessors of Harris County, 226 Ga. 570, 176 S.E.2d 102 (1970).
Neb.—Nebraska State Bank v. Dudley, 203 Neb. 226, 278 N.W.2d 334 (1979).
Or.—Wisherd v. Paul Koch Volkswagen, Inc., 28 Or. App. 513, 559 P.2d 1305 (1977).
**Appeal bonds**
Colo.—Reed v. Dolan, 195 Colo. 193, 577 P.2d 284 (1978).
Fla.—Gallie v. Wainwright, 362 So. 2d 936 (Fla. 1978).

La.—Houston v. Brown, 292 So. 2d 911 (La. Ct. App. 2d Cir. 1974).

**Juvenile proceedings**

The appeal provisions of the rules of procedure for juvenile court, insofar as they are made applicable to appeals from parental termination proceedings, do not constitute an unlawful legislative encroachment upon the rulemaking authority of the supreme court.

Ariz.—State v. Garza, 128 Ariz. 8, 623 P.2d 367 (Ct. App. Div. 1 1981).

4 Alaska—Winegardner v. Greater Anchorage Area Borough Bd. of Equalization, 534 P.2d 541 (Alaska 1975).

Idaho—Dolbeer v. Harten, 91 Idaho 141, 417 P.2d 407 (1965).

N.M.—State v. Ball, 1986-NMSC-030, 104 N.M. 176, 718 P.2d 686 (1986).

N.C.—State v. Mangino, 200 N.C. App. 430, 683 S.E.2d 779 (2009).

Tex.—Southwestern Bell Tel. Co. v. Public Utility Commission of Texas, 615 S.W.2d 947 (Tex. Civ. App. Austin 1981), writ refused n.r.e., 622 S.W.2d 82 (Tex. 1981).

**Second or subsequent petition for collateral relief**

In determining whether a statute limiting judicial review of a second or subsequent petition for collateral relief violates the separation-of-powers doctrine, the inquiry is whether the statute establishes a rule of procedure which state courts must follow.

Pa.—Com. v. Morris, 565 Pa. 1, 771 A.2d 721 (2001).

**Time for decision**

A legislative command to the court to hear and determine a case within a specified time from the time of taking the appeal did not on its face necessarily unduly burden or unduly interfere with the judiciary in the exercise of its judicial functions.

Or.—State ex rel. Emerald People's Utility Dist. v. Joseph, 292 Or. 357, 640 P.2d 1011 (1982).

5 Mo.—De May v. Liberty Foundry Co., 327 Mo. 495, 37 S.W.2d 640 (1931).

Pa.—In re Twenty-First Senatorial Dist. Nomination, 281 Pa. 273, 126 A. 566 (1924).

**Not restricted to final orders**

The General Assembly remains free to depart from the general principle that appellate review is restricted to final orders.

Va.—Blevins v. Prince William County Dept. of Social Services, 61 Va. App. 94, 733 S.E.2d 674 (2012).

6 U.S.—Lake Butler Apparel Co. v. Secretary of Labor, 519 F.2d 84 (5th Cir. 1975).

Ind.—Mosley v. Board of Com'rs of Marion County, 200 Ind. 515, 165 N.E. 241 (1929).

7 Tex.—Walker v. Whatley, 318 S.W.3d 541 (Tex. App. Beaumont 2010).

8 Kan.—Stephens v. Unified School Dist. No. 500, 218 Kan. 220, 546 P.2d 197 (1975).

9 Ohio—Benning v. Schlemmer, 57 Ohio App. 457, 11 Ohio Op. 196, 26 Ohio L. Abs. 318, 14 N.E.2d 941 (1st Dist. Hamilton County 1937).

R.I.—Gunn v. Union R. Co., 27 R.I. 432, 63 A. 239 (1906).

10 Ariz.—Arizona Podiatry Ass'n v. Director of Ins., 101 Ariz. 544, 422 P.2d 108 (1966).

Fla.—Lyden v. State, 281 So. 2d 591 (Fla. 2d DCA 1973).

N.J.—State v. Loftin, 157 N.J. 253, 724 A.2d 129 (1999).

N.C.—Duke Power Co. v. Winebarger, 300 N.C. 57, 265 S.E.2d 227 (1980).

**Propriety of sentences**

Under an act requiring, among other things, the court to determine on appeal the propriety of a sentence in each case involving criminal homicide by comparing such case with previous cases involving the same or similar circumstances, the legislature attempts to exercise the judicial function in violation of the constitution.

Neb.—State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982).

11 Cal.—People v. Mena, 54 Cal. 4th 146, 141 Cal. Rptr. 3d 469, 277 P.3d 160 (2012).

Mo.—State ex rel. Praxair, Inc. v. Missouri Public Service Com'n, 344 S.W.3d 178 (Mo. 2011).

Mont.—In re Formation of East Bench Irr. Dist., 2008 MT 210, 344 Mont. 184, 186 P.3d 1266 (2008).

Nev.—Berkson v. LePome, 245 P.3d 560, 126 Nev. Adv. Op. No. 46 (Nev. 2010).

Tex.—In re Q.W.J., 331 S.W.3d 9 (Tex. App. Amarillo 2010).

**Supreme court is responsible for rules governing appeals, not legislature**

Ill.—Stein v. Krislov, 405 Ill. App. 3d 538, 345 Ill. Dec. 675, 939 N.E.2d 518 (1st Dist. 2010).

12 Mont.—Jordan v. Andrus, 26 Mont. 37, 66 P. 502 (1901).

**Prejudicial error**

  

The power to decide whether it is prejudicial error to give a special instruction relating exclusively to the defendant's testimony in a criminal case is lodged with the judicial rather than with the legislative branch of state government.

Nev.—Graves v. State, 82 Nev. 137, 413 P.2d 503 (1966).

13 U.S.—Dawsey v. Government of Virgin Islands, 33 V.I. 110, 903 F. Supp. 878 (D.V.I. 1995).

Ariz.—In re Property at 6757 S. Burcham Ave., 204 Ariz. 401, 64 P.3d 843 (Ct. App. Div. 2 2003).

14 Miss.—Great Atlantic & Pacific Tea Co. v. Davis, 177 Miss. 562, 171 So. 550 (1937).

15 Ky.—Kentucky Commission on Human Rights v. Com., Dept. of Justice, Bureau of State Police, 586 S.W.2d 270 (Ky. Ct. App. 1979).

Wash.—Saldin Securities, Inc. v. Snohomish County, 134 Wash. 2d 288, 949 P.2d 370 (1998).

16 Ill.—Mund v. Brown, 393 Ill. App. 3d 994, 332 Ill. Dec. 935, 913 N.E.2d 1225 (5th Dist. 2009).

17 Conn.—State v. Nardini, 187 Conn. 109, 445 A.2d 304 (1982).

18 La.—State v. Henderson, 168 La. 487, 122 So. 591 (1929).

N.Y.—People v. Bellows, 281 N.Y. 67, 22 N.E.2d 238 (1939).

19 Haw.—In re Hawaiian Land Co., 53 Haw. 45, 487 P.2d 1070 (1971).

Ill.—People v. Capoldi, 37 Ill. 2d 11, 225 N.E.2d 634 (1967).

**Expedited review**

Cal.—Saltonstall v. City of Sacramento, 231 Cal. App. 4th 837, 180 Cal. Rptr. 3d 342 (3d Dist. 2014), as modified on other grounds, (Dec. 18, 2014).

**Capital cases**

The statute that established special appellate and postconviction procedures for capital cases was a statute of limitations and, thus, did not violate the Idaho Constitution's separation-of-powers provisions.

Idaho—Stuart v. State, 149 Idaho 35, 232 P.3d 813 (2010).

20 Fla.—Sinclair Refining Co. v. Hunter, 139 Fla. 803, 191 So. 38 (1939).

Wis.—O'Donnell v. State, 126 Wis. 599, 106 N.W. 18 (1906).

21 Utah—Utah Fuel Co. v. Industrial Commission of Utah, 73 Utah 199, 273 P. 306 (1928).

22 N.Y.—Waterbury v. Nassor, 130 Misc. 200, 224 N.Y.S. 179 (County Ct. 1927).

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**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**2. Legislative Encroachment on Judiciary**

**b. Remedies and Procedure in Regard to Legislative Encroachment on Judiciary**

**(1) Remedies and Procedure in Regard to Legislative Encroachment on Judiciary, in General**

## § 305. Requiring and restricting issue of writs as legislative or judicial function

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2356, 2357, 2365, 2372, 2373

**Subject to the limitations imposed by the constitution, it is within the power of the legislature to regulate and restrict the issuance and use of writs by the courts; however, it cannot interfere with, or abolish the use of, a writ authorized by the constitution or necessary to the exercise of inherent discretionary powers of the courts.**

As a general rule, it is within the power of the legislature to regulate and restrict the issuance and use of writs by the courts subject to the limitations imposed by the constitution.[1] However, it cannot interfere with, or abolish the use of, a writ where such action would tend to deprive the court of the means of exercising its discretionary powers[2] or where the authority to issue the writ has been expressly conferred by the constitution.[3]

Accordingly, the legislature may restrict the use of the writ of certiorari.[4] Except as to its use in respect of incidental matters involved in the enforcement of new statutory remedies, however, it cannot abolish the writ[5] or control the court's judgment with

respect to its issuance.[6] Similarly, the legislature may ordinarily regulate the issuance of mandamus[7] although according to some authority it cannot, as a general rule, enlarge or abridge the constitutional authority conferred on the courts to issue such writs.[8]

While the legislature may regulate the granting of a stay of execution,[9] it cannot forbid the issue of executions[10] or limit the constitutional authority of the courts to issue the writ of supersedeas.[11] Where the constitution confers on the courts the power to issue the writ of prohibition, the legislature may not enlarge or restrict the then existing jurisdiction of the courts to issue the writ[12] although there is authority to the contrary.[13]



Footnotes

1 Cal.—People v. Associated Oil Co., 211 Cal. 93, 294 P. 717 (1930).
Ga.—Owens v. Watkins, 189 Ga. 311, 5 S.E.2d 905 (1939).
Tex.—Walker v. State, 537 S.W.2d 36 (Tex. Crim. App. 1976).

2 Ga.—Bankers Life & Casualty Co. v. Cravey, 209 Ga. 274, 71 S.E.2d 659 (1952).

3 Cal.—People v. Associated Oil Co., 211 Cal. 93, 294 P. 717 (1930).
Ga.—City Inv. Co. v. Crawley, 187 Ga. 48, 199 S.E. 747 (1938).
Tex.—State ex rel. Wilson v. Harris, 555 S.W.2d 470 (Tex. Crim. App. 1977).
**Prerogative writs superseded by constitutional provision**
N.J.—Fischer v. Bedminster Tp., Somerset County, 5 N.J. 534, 76 A.2d 673 (1950).
**Constitutional jurisdiction may not be diminished by statute**
The supreme court's constitutional jurisdiction over proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition may not be diminished by statute.
Cal.—California Redevelopment Assn. v. Matosantos, 53 Cal. 4th 231, 135 Cal. Rptr. 3d 683, 267 P.3d 580 (2011).

4 Ga.—Von Schmidt v. Noland Co., 176 Ga. 784, 169 S.E. 11 (1933).
N.J.—In re Whitehead's Estate, 85 N.J. Eq. 114, 94 A. 796 (Prerog. Ct. 1915), aff'd, 86 N.J. Eq. 439, 99 A. 1071 (Ct. Err. & App. 1916).

5 Pa.—In re Twenty-First Senatorial Dist. Nomination, 281 Pa. 273, 126 A. 566 (1924).
**May not strip courts of authority to review**
The legislature may not strip the courts of the authority to review the decisions of lower tribunals via a petition for the common-law writ of certiorari.
Ala.—South Alabama Skills Training Consortium v. Ford, 997 So. 2d 309, 240 Ed. Law Rep. 947 (Ala. Civ. App. 2008).
**Review of administrative action**
The power of constitutional certiorari to review the actions of an administrative agency cannot be abridged by the legislature.
Wash.—King County v. Washington State Bd. of Tax Appeals, 28 Wash. App. 230, 622 P.2d 898 (Div. 1 1981).

6 Ala.—Crawford v. State, 288 Ala. 686, 264 So. 2d 559 (1972).
Wash.—Clark County Public Utility Dist. No. 1 v. Wilkinson, 139 Wash. 2d 840, 991 P.2d 1161 (2000).

7 Tex.—State ex rel. Wilson v. Harris, 555 S.W.2d 470 (Tex. Crim. App. 1977).
W. Va.—State ex rel. Blankenship v. McHugh, 158 W. Va. 986, 217 S.E.2d 49 (1975).
**One-year statute of limitations for writ did not violate separation of powers**
Fla.—Lewis v. Florida Parole Com'n, 112 So. 3d 534 (Fla. 1st DCA 2013), review granted, 130 So. 3d 693 (Fla. 2013) and cause dismissed, 153 So. 3d 907 (Fla. 2014).
**Right of indigents to proceed with petition**
The right of indigents to proceed with a petition for a writ of mandamus without payment of costs could be properly limited by the legislature, including a requirement that inmates contribute toward the cost of their lawsuits and ultimately pay for the lawsuits in full if they subsequently become able to do so.
Fla.—Jackson v. Florida Dept. of Corrections, 790 So. 2d 381 (Fla. 2000).

8 Ga.—Bankers Life & Casualty Co. v. Cravey, 209 Ga. 274, 71 S.E.2d 659 (1952).

9 Cal.—People v. Associated Oil Co., 211 Cal. 93, 294 P. 717 (1930).
Tex.—Beaumont Petroleum Syndicate v. Broussard, 64 S.W.2d 993 (Tex. Civ. App. Beaumont 1933).

10 N.C.—Barnes v. Barnes, 53 N.C. 366, 8 Jones 366, 1861 WL 1248 (1861).

11 Cal.—People v. Associated Oil Co., 211 Cal. 93, 294 P. 717 (1930).

12 Ga.—Bankers Life & Casualty Co. v. Cravey, 209 Ga. 274, 71 S.E.2d 659 (1952).
Utah—Barnes v. Lehi City, 74 Utah 321, 279 P. 878 (1929).

13 W. Va.—State ex rel. Blankenship v. McHugh, 158 W. Va. 986, 217 S.E.2d 49 (1975).

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## § 306. Requiring and restricting issue of writs as legislative or judicial function—Habeas corpus

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2373

**The legislature may not enlarge or limit the constitutional power of a court to issue the writ of habeas corpus or wholly deprive the court of its original jurisdiction in this respect.**

The legislature may not enlarge[1] or limit[2] the constitutional power of a court to issue the writ of habeas corpus or wholly deprive the court of its original jurisdiction in this respect.[3] However, the legislature has power to adjust the circumstances under which the remedy of the writ of habeas corpus is deployed.[4] In addition, it has been found that the legislature is authorized to enact laws placing conditions on the right to appeal the denial of the issuance of a writ of habeas corpus.[5]

Footnotes

1 Okla.—Grose v. Romero, 1948 OK 120, 200 Okla. 330, 193 P.2d 1014 (1948).

2 Fla.—Jones v. Florida Parole Com'n, 48 So. 3d 704 (Fla. 2010).
Mo.—Ex parte Hagan, 295 Mo. 435, 245 S.W. 336 (1922).
N.Y.—People ex rel. Patrick v. Frost, 133 A.D. 179, 117 N.Y.S. 524 (2d Dep't 1909).

3 N.D.—McGuire v. Warden of State Farm [State Penitentiary], 229 N.W.2d 211 (N.D. 1975).
**Without power to limit or alter jurisdiction**
The legislature is without power to limit or alter the original jurisdiction of courts of appeals in habeas corpus actions.
Ohio—In re G.T.B., 128 Ohio St. 3d 502, 2011-Ohio-1789, 947 N.E.2d 166 (2011).
**No repeal of Supreme Court's authority**
A provision of the Antiterrorism and Effective Death Penalty Act preventing the Supreme Court from reviewing a court of appeals order denying leave to file a second habeas petition by appeal or by writ of certiorari does not, by implication, repeal the Supreme Court's authority to entertain original habeas petitions.
U.S.—Felker v. Turpin, 518 U.S. 651, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996).

4 U.S.—Rodriguez v. Zavaras, 42 F. Supp. 2d 1059 (D. Colo. 1999).

5 Ga.—Fullwood v. Sivley, 271 Ga. 248, 517 S.E.2d 511 (1999).

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# 16 C.J.S. Constitutional Law § 307

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## § 307. Requiring and restricting issue of writs as legislative or judicial function—Injunctions

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2365

**The legislature generally may not abolish or abridge the power of the courts to issue injunctions although it may prescribe conditions or restrict the use of injunctions, at least where a plain, speedy, and adequate remedy at law is provided.**

Generally, the legislature may not abolish or abridge the power of courts to issue injunctions[1] or regulate it in specific classes of disputes, such as labor disputes, in such a manner as to that extent to effect that purpose.[2] Under the separation-of-powers doctrine, therefore, the legislature cannot abridge the prerogative of the courts to grant an injunction to protect a party's constitutional right.[3]

On the other hand, except as limited by the constitution, the legislature may prescribe conditions as to notice and hearing[4] or undertaking for the payment of damages.[5] Furthermore, it may restrict the use of injunctions,[6] at least where a plain, speedy, and adequate remedy at law is provided.[7] In this regard, statutes limiting the use of injunctions in cases involving labor disputes

  

have been upheld on the theory that they effect merely a change in the substantive law, rendering certain acts lawful and not within the restraining power of the courts.[8]

A statute limiting the power of courts to enjoin or restrain the collection of taxes, and providing an adequate legal remedy in substitution therefor, is valid.[9] However, such a statute has been held not to override the judicial power to issue injunctive relief if extraordinary circumstances in respect of the operation of the statute bring the case within some acknowledged foundation of equity jurisdiction,[10] particularly in a preliminary action against an administrative order already in effect held to be invalid.[11]

While a statute may authorize the granting of an injunction in specified circumstances,[12] the legislature may not direct the issuance of an injunction without a judicial determination of the facts necessary to support it[13] or in any manner mandate a court of equity to issue an injunction.[14] Where a court, under the constitution, has no original jurisdiction to issue a writ of injunction, the legislature cannot confer such power on the court.[15]

***Public duty.***

When the legislature creates a public duty and a corresponding right in its citizens to enforce the duty it has created, and provides explicitly that the remedy of vindication will be an injunction, the legislature has not thereby encroached on judicial powers.[16]

***Federal law.***

If Congress wishes to do so, it can require the federal courts to automatically enjoin actual or imminent violations of a statute without an individualized balancing of the equities.[17] The United States Constitution is not offended when Congress alters the scope of a specific injunction that is subject to the ongoing supervision of the court.[18]



Footnotes

1 N.J.—Phelps Dodge Copper Products Corp. v. United Elec., Radio & Mach. Workers of America, 138 N.J. Eq. 3, 46 A.2d 453 (Ch. 1946), order aff'd, 139 N.J. Eq. 97, 49 A.2d 896 (Ct. Err. & App. 1946).
N.M.—Lougee v. New Mexico Bureau of Revenue Commissioner, 1937-NMSC-062, 42 N.M. 115, 76 P.2d 6 (1937).
N.Y.—Kay-Fries, Inc. v. Martino, 73 A.D.2d 342, 426 N.Y.S.2d 304 (2d Dep't 1980).
Wash.—Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 63 P.2d 397 (1936).
**Jurisdiction cannot be legislatively limited or controlled**
The jurisdiction of the district court to hear suits for injunctions cannot be legislatively limited or controlled.
Neb.—Conley v. Brazer, 278 Neb. 508, 772 N.W.2d 545 (2009).
**Blanket statutory proscription unconstitutional**
A blanket statutory proscription on stays or injunctions against the taking and using of appropriated property pending appellate review was an unconstitutional encroachment on the judiciary's constitutional and inherent authority in violation of the separation-of-powers doctrine.
Ohio—Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).

2 N.J.—Eastwood-Nealley Corp. v. International Ass'n of Machinists, Dist. No. 47, 124 N.J. Eq. 274, 1 A.2d 477 (Ch. 1938).
N.Y.—Busch Jewelry Co. v. United Retail Employees Union, Local 830, 281 N.Y. 150, 22 N.E.2d 320, 124 A.L.R. 744 (1939).
Wash.—Adams v. Building Service Employees Intern. Union, Local No. 6, 197 Wash. 242, 84 P.2d 1021 (1938).

3 Cal.—Saltonstall v. City of Sacramento, 231 Cal. App. 4th 837, 180 Cal. Rptr. 3d 342 (3d Dist. 2014), as modified on other grounds, (Dec. 18, 2014).

4 Ala.—Rochell v. City of Florence, 236 Ala. 313, 182 So. 50 (1938).

5 Ind.—Indianapolis Dairymen's Co-op. v. Bottema, 226 Ind. 260, 79 N.E.2d 409 (1948).

6 Ariz.—Town of Chino Valley v. State Land Dept., 119 Ariz. 243, 580 P.2d 704 (1978).
Cal.—M Restaurants, Inc. v. San Francisco Local Joint Exec. Bd. of Culinary etc. Union, 124 Cal. App. 3d 666, 177 Cal. Rptr. 690 (1st Dist. 1981).
Colo.—City of Westminster v. District Court In and For Adams County, 167 Colo. 263, 447 P.2d 537 (1968).
La.—Baton Rouge Coca-Cola Bottling Co., Ltd. v. General Truck Drivers, Warehousemen and Helpers, Local Union No. 5, 403 So. 2d 632 (La. 1981).
Nev.—State v. Glusman, 98 Nev. 412, 651 P.2d 639 (1982).

7 N.M.—Lougee v. New Mexico Bureau of Revenue Commissioner, 1937-NMSC-062, 42 N.M. 115, 76 P.2d 6 (1937).
Tex.—Texas & N. O. R. Co. v. Houston Belt & Terminal Ry. Co., 227 S.W.2d 610 (Tex. Civ. App. Galveston 1950).

8 Cal.—M Restaurants, Inc. v. San Francisco Local Joint Exec. Bd. of Culinary etc. Union, 124 Cal. App. 3d 666, 177 Cal. Rptr. 690 (1st Dist. 1981).
Ill.—Fenske Bros. v. Upholsterers' International Union of North America, Local No. 18, 358 Ill. 239, 193 N.E. 112, 97 A.L.R. 1318 (1934).

9 N.M.—Lougee v. New Mexico Bureau of Revenue Commissioner, 1937-NMSC-062, 42 N.M. 115, 76 P.2d 6 (1937).
Tex.—Rogers v. Daniel Oil & Royalty Co., 130 Tex. 386, 110 S.W.2d 891 (1937).
Wash.—Roon v. King County, 24 Wash. 2d 519, 166 P.2d 165 (1946).

10 U.S.—Whitmore v. Bureau of Revenue of State of New Mexico, 64 F. Supp. 911 (D.N.M. 1946), judgment aff'd, 329 U.S. 668, 67 S. Ct. 62, 91 L. Ed. 589 (1946) and judgment aff'd, 329 U.S. 668, 67 S. Ct. 63, 91 L. Ed. 589 (1946) and judgment aff'd, 329 U.S. 668, 67 S. Ct. 63, 91 L. Ed. 589 (1946).

11 Tex.—Rogers v. Daniel Oil & Royalty Co., 105 S.W.2d 476 (Tex. Civ. App. Galveston 1937), judgment aff'd, 130 Tex. 386, 110 S.W.2d 891 (1937).

12 Wis.—State v. Coubal, 248 Wis. 247, 21 N.W.2d 381 (1946).

13 Wis.—City of Janesville v. Carpenter, 77 Wis. 288, 46 N.W. 128 (1890).

14 Fla.—Rich v. Ryals, 212 So. 2d 641 (Fla. 1968).

15 Tex.—Lane v. Ross, 151 Tex. 268, 249 S.W.2d 591 (1952).

16 Fla.—Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191 (Fla. 4th DCA 2001).

17 U.S.—Owner Operator Independent Drivers Ass'n, Inc. v. Swift Transp. Co., Inc. (AZ), 367 F.3d 1108 (9th Cir. 2004).

18 U.S.—Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140 (D.D.C. 2002), aff'd, 333 F.3d 228, 56 Fed. R. Serv. 3d 257 (D.C. Cir. 2003).

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# 16 C.J.S. Constitutional Law § 308

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## § 308. Other remedial or procedural regulations as legislative or judicial functions

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2357 to 2368

**Principles governing the power of the legislature to regulate remedies and procedure apply in determining the validity of statutes relating to various particular matters.**

The legislature, under its power to regulate remedies and procedure, may, where not restricted by constitutional provision, do various things,[1] such as require that a lost or destroyed will be proved by at least two witnesses;[2] limit the number of new trials that may be granted the same party in any cause;[3] authorize relief from an order taken against a moving party through mistake, inadvertence, surprise, or excusable neglect;[4] and prescribe, as to a tribunal created by it, what record it must keep and what use, if any, will be permitted of the record.[5]

On the other hand, the judicial power to correct inadvertent entries or irregularities finding place in the minutes of the court is beyond legislative interference.[6] Enactments cannot affect the power of the court to determine just compensation for property

  

taken for public use, and the means and processes for such determination,[7] although it has been held that the legislature may provide for a preliminary estimate of such compensation by an administrative board in condemnation proceedings.[8]

Any purely judicial function cannot be deemed invalid or illegal by a statute's requiring a judicial action to occur within a certain period of time.[9] Accordingly, a statute is unconstitutional which forbids a court to hold any issue under advisement for more than a specified time and deprives the court of jurisdiction in the cause for failure to determine any issue within the specified time.[10] It may be exclusively a judicial function to prescribe the duties of particular judges,[11] and the legislature may not prohibit the keeping of records by a court.[12]

***Arbitration.***

The legislature has power to provide a method of voluntary arbitration.[13] The adoption of an Uniform Arbitration Act does not violate the separation-of-powers doctrine where the constitution specifically vests the legislature with the power to enact necessary and proper laws to establish an arbitration system.[14] Moreover, Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers.[15]

***Limiting defenses.***

It is within the power of the legislature, without violating the separation-of-powers doctrine, to abolish certain matters as a defense in specified proceedings[16] and to prescribe the time at which certain defenses will be interposed and to provide that they will be considered waived if not set up within the time prescribed.[17] It has been held, however, that the legislature does not possess the power to prevent one from making a defense to a charge brought against him or her by substituting an irrebuttable presumption of fact.[18]

***Limitation and revival of actions.***

Limitation of actions is generally subject to legislative control without violating the separation-of-powers doctrine.[19] In addition, the legislature has power to provide that actions for tortious breach of contract will survive the death of the plaintiff.[20]

***Regulating references.***

A state referee system, as a special tribunal, does not encroach upon or unconstitutionally compete with the courts.[21] Legislation providing for the trial of causes by auditors and referees and making their findings evidence, without concluding the parties thereby, is within the power of the legislature.[22] However, legislation making the findings of such officers conclusive without intervention or approval of the court is ordinarily an invasion of the province of the judiciary and unconstitutional.[23]

***Frivolous litigation.***

While the ability to curb frivolous litigation practices is an essential part of the inherent powers of the courts to control and protect the integrity of their own processes, the public also has a definable interest in curtailing the activities of vexatious litigators that transcends the boundaries of judicial concerns and, as a result, is appropriate for legislative enactment.[24]

Footnotes

1 Md.—Commission on Medical Discipline v. Stillman, 291 Md. 390, 435 A.2d 747 (1981).

**Denial of access to index of criminal records**

Mass.—New Bedford Standard-Times Pub. Co. v. Clerk of Third Dist. Court of Bristol, 377 Mass. 404, 387 N.E.2d 110 (1979).

**Medical malpractice panel**

The provisions of a medical malpractice panel act, including the requirement that a malpractice claim be submitted to a screening panel for the purpose of preventing the filing of actions which do not permit at least a reasonable inference of malpractice and to promote a settlement on meritorious claims, are not unconstitutional as infringing on the doctrine of separation of powers.

Mont.—Linder v. Smith, 193 Mont. 20, 629 P.2d 1187 (1981).

**Reinstatement of delinquent mortgage**

A statute permitting a mortgagor to reinstate delinquent mortgages only once in a specified period did not impermissibly interfere with the inherent powers of a court of equity.

Ill.—First Federal Sav. and Loan Ass'n of Chicago v. Walker, 91 Ill. 2d 218, 62 Ill. Dec. 956, 437 N.E.2d 644 (1982).

2 Idaho—Hull v. Cartin, 61 Idaho 578, 105 P.2d 196 (1940).

3 Ala.—Liberty Nat. Life Ins. Co. v. Trammell, 37 Ala. App. 204, 67 So. 2d 41 (1953).

4 Cal.—Hirsch v. Hirsch, 74 Cal. App. 2d 391, 168 P.2d 770 (2d Dist. 1946).

5 N.J.—Kozler v. New York Telephone Co., 93 N.J.L. 279, 108 A. 375 (N.J. Sup. Ct. 1919).

6 Tex.—Nevitt v. Wilson, 116 Tex. 29, 285 S.W. 1079, 48 A.L.R. 355 (1926).

7 Fla.—Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (1926).

W. Va.—State ex rel. United Fuel Gas Co. v. De Berry, 130 W. Va. 418, 43 S.E.2d 408 (1947).

8 N.D.—Becker County Sand & Gravel Co. v. Wosick, 62 N.D. 740, 245 N.W. 454 (1932).

9 Pa.—Gow v. Department of Educ., 763 A.2d 528, 149 Ed. Law Rep. 828 (Pa. Commw. Ct. 2000).

10 Ind.—State ex rel. Kostas v. Johnson, 224 Ind. 540, 69 N.E.2d 592, 168 A.L.R. 1118 (1946).

11 N.J.—State v. Collins, 180 N.J. Super. 190, 434 A.2d 628 (App. Div. 1981), judgment aff'd, 90 N.J. 449, 448 A.2d 977 (1982).

12 Mass.—New Bedford Standard-Times Pub. Co. v. Clerk of Third Dist. Court of Bristol, 377 Mass. 404, 387 N.E.2d 110 (1979).

13 Colo.—Ezell v. Rocky Mountain Bean & Elevator Co., 76 Colo. 409, 232 P. 680 (1925).

N.Y.—Berkovitz v. Arbib & Houlberg, 230 N.Y. 261, 130 N.E. 288 (1921).

**Delegation of power to consent**

Under the state constitutional right to a jury trial, the legislature may devise reasonable rules in civil litigation to permit the delegation to another party of the power to consent to arbitration instead of a jury trial.

Cal.—Ruiz v. Podolsky, 50 Cal. 4th 838, 114 Cal. Rptr. 3d 263, 237 P.3d 584 (2010).

**Lemon-law disputes**

The reference of lemon-law disputes to a private arbitrator does not constitute an unconstitutional delegation of judicial authority.

N.Y.—Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State, 146 A.D.2d 212, 540 N.Y.S.2d 888 (3d Dep't 1989), order aff'd, 75 N.Y.2d 175, 551 N.Y.S.2d 470, 550 N.E.2d 919 (1990).

14 Ky.—Dutschke v. Jim Russell Realtors, Inc., 281 S.W.3d 817 (Ky. Ct. App. 2008).

15 U.S.—Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986).

16 Ark.—Young v. Young, 207 Ark. 36, 178 S.W.2d 994, 152 A.L.R. 327 (1944).

17 Ill.—Downey v. People, 205 Ill. 230, 68 N.E. 807 (1903).

18 Md.—Mahoney v. Byers, 187 Md. 81, 48 A.2d 600 (1946).

19 U.S.—Dierksen By and Through Dierksen v. Navistar Intern. Transp. Corp., 912 F. Supp. 480 (D. Kan. 1996).

Colo.—Hickerson v. Vessels, 2014 CO 2, 316 P.3d 620 (Colo. 2014).

Minn.—Sanchez v. State, 816 N.W.2d 550 (Minn. 2012).

20 Nev.—Forrester v. Southern Pac. Co., 36 Nev. 247, 134 P. 753 (1913).

  

21 Conn.—DiBerardino v. DiBerardino, 213 Conn. 373, 568 A.2d 431 (1990).

22 Cal.—Fleming v. Bennett, 18 Cal. 2d 518, 116 P.2d 442 (1941).

Pa.—Commonwealth ex rel. Kelley v. Cantrell, 327 Pa. 369, 193 A. 655 (1937).

23 Ark.—Jansen v. Blissenbach, 214 Ark. 755, 217 S.W.2d 849 (1949).

24 Ohio—Mayer v. Bristow, 91 Ohio St. 3d 3, 2000-Ohio-109, 740 N.E.2d 656 (2000).

**Three-strikes rule for indigent inmates**

Del.—Walls v. Phelps, 85 A.3d 89 (Del. 2014).

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# 16 C.J.S. Constitutional Law § 309

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**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**2. Legislative Encroachment on Judiciary**

**b. Remedies and Procedure in Regard to Legislative Encroachment on Judiciary**

**(2) Legislation Affecting Pending Litigation or Adjudicated Rights**

## § 309. Legislation affecting pending litigation or adjudicated rights, generally

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2352, 2357, 2382 to 2385

**The state legislatures may not, by legislation passed after causes of action have been submitted to the courts for judicial determination, control or affect the result of litigation; in certain instances, however, legislative enactments changing the law affecting the right of recovery, but leaving to the judiciary its application, have been held applicable in pending cases, and statutes affecting merely practice and procedure are valid even as applied to pending cases.**

Under the state constitutions, the state legislatures cannot, as a general rule, control or affect the result of litigation by legislation passed after causes of action have been submitted to the courts for judicial determination[1] as by statutes granting continuances in pending cases,[2] declaring a suit abated,[3] or reviving one that has already abated[4] or been barred by the courts.[5] Additionally, the legislature has no constitutional authority to validate defective judicial proceedings so as to affect in any way the rights of parties to pending litigation.[6]

  

On the other hand, in certain instances, legislative enactments changing the law affecting the right of recovery, but leaving to the judiciary its application, have been held applicable in pending cases,[7] at least in the case of statutes relating to the public interest.[8] Thus, a statute prescribing new rules and additional provisions for making a public improvement in substitution for those under which the court and commissioners are acting is constitutional.[9] In addition, the legislature may pass a law that directly impacts a case pending in court,[10] by prescribing a facially neutral law for the court to apply to pending litigation rather than making a case-by-case application of the law to a particular sets of facts.[11]

Except where otherwise provided by the organic law,[12] statutes affecting merely the practice and procedure are valid even as applied to pending cases.[13] However, the legislature cannot change the procedure affecting past transactions in such a way as to prevent judicial control of that situation.[14] Thus, it cannot interfere with judicial discretion as to the granting of a stay of a pending case[15] or, as to a pending case, make a tax deed prima facie evidence of title and of the matters recited in the deed.[16]

***Federal law.***

Under the doctrine of separation of powers, Congress is always free to amend the law even if doing so has the effect of extinguishing a pending court case.[17] Thus, if a judicial decision is not yet final, Congress may change the law applicable generally, and the court must apply the changed law to pending cases although Congress may not nullify particular decisions by prescribing a rule of decision to the judicial department.[18]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Iran Threat Reduction and Syria Human Rights Act of 2012, a statute enacted specifically to facilitate judgment creditors' ability to satisfy terrorism-related judgments against Iran, does not violate separation of powers between legislative branch and judiciary, even though statute identifies judgment creditors' underlying turnover proceeding by the district court's docket number; by providing a new standard clarifying that, if Iran owned certain assets, judgment creditors would be permitted to execute against those assets, statute retroactively amended the law applicable to the pending proceeding, which was permissible exercise of legislative authority, even if amendment was outcome determinative, and statute did not effectively direct certain factfinding or a particular outcome but, instead, changed the law by establishing new substantive standard, entrusting to the district court application of that standard to the facts, contested or uncontested, found by the court. U.S.C.A. Const. Art. 3, § 1 et seq.; Iran Threat Reduction and Syria Human Rights Act of 2012, § 502(a–d), 22 U.S.C.A. § 8772. Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016).

Hypothetical law, directing judgment for "Smith" if the court finds that "Jones" was duly served with notice of the proceedings, would be invalid under separation-of-powers principles. U.S.C.A. Const. Art. 3, § 1 et seq. Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016).

**[END OF SUPPLEMENT]**



Footnotes

1 Fla.—Reedus v. Friedman, 287 So. 2d 355 (Fla. 3d DCA 1973).
Pa.—Gibson v. Com., 490 Pa. 156, 415 A.2d 80 (1980).

2 Ark.—Burt v. Williams, 24 Ark. 91, 1863 WL 434 (1863).

3 Ill.—People ex rel. Coen v. Henry, 301 Ill. 51, 133 N.E. 636 (1921).

Miss.—Miller v. Johnston, 144 Miss. 201, 109 So. 715 (1926).

4 Miss.—Miller v. Davis, 109 So. 721 (Miss. 1926).

5 Tex.—Casparis v. Fidelity Union Cas. Co., 65 S.W.2d 404 (Tex. Civ. App. Austin 1933), writ refused.

6 Mass.—Denny v. Mattoon, 84 Mass. 361, 2 Allen 361, 1861 WL 4691 (1861).

7 Ill.—People ex rel. Coen v. Henry, 301 Ill. 51, 133 N.E. 636 (1921).

8 U.S.—Western Union Telegraph Co. v. Louisville & N.R. Co., 258 U.S. 13, 42 S. Ct. 258, 66 L. Ed. 437 (1922).

9 Mass.—Lancy v. City of Boston, 186 Mass. 128, 71 N.E. 302 (1904).

10 Wash.—In re Estate of Hambleton, 181 Wash. 2d 802, 335 P.3d 398 (2014).

11 Wash.—Port of Seattle v. Pollution Control Hearings Bd., 151 Wash. 2d 568, 90 P.3d 659 (2004).

12 N.M.—State ex rel. Hannah v. Armijo, 1933-NMSC-087, 38 N.M. 73, 28 P.2d 511 (1933).

13 Ill.—Trustees of Schools of Tp. No. 33 North, Range No. 3 East of Third Principal Meridian, La Salle County, v. Farnsworth, 278 Ill. App. 474, 1934 WL 5195 (2d Dist. 1934), appeal denied.

Wis.—Elm Park Iowa, Inc. v. Denniston, 91 Wis. 2d 227, 280 N.W.2d 262 (1979).

**Retroactive application of amendment to statute of limitations**

Or.—Jones v. Douglas County, 247 Or. App. 56, 270 P.3d 264 (2011).

**Stay of judgment pending appeal**

An amendment to a statute, which was enacted in response to a decision holding prior statutory procedures unconstitutional and which stayed appeals pending with regard to such deficiency judgments until a hearing had been held, was not unconstitutional as a violation of separation-of-powers in that a mortgagor, who had appealed a deficiency judgment rendered under a prior statute, had not acquired an indefeasible vested right in the judgment.

Conn.—Enfield Federal Sav. and Loan Ass'n v. Bissell, 184 Conn. 569, 440 A.2d 220 (1981).

14 Conn.—Preveslin v. Derby & Ansonia Developing Co., 112 Conn. 129, 151 A. 518, 70 A.L.R. 1426 (1930).

15 N.Y.—Sliosberg v. New York Life Ins. Co., 217 A.D. 67, 216 N.Y.S. 215 (1st Dep't 1926), aff'd, 244 N.Y. 482, 155 N.E. 749 (1927) and aff'd, 244 N.Y. 599, 155 N.E. 913 (1927).

16 N.M.—Kreigh v. State Bank of Alamogordo, 1933-NMSC-049, 37 N.M. 360, 23 P.2d 1085 (1933).

17 U.S.—Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers, 619 F.3d 1289 (11th Cir. 2010).

18 U.S.—Guangdong Wireking Housewares & Hardware Co., Ltd. v. U.S., 745 F.3d 1194 (Fed. Cir. 2014).

**Retroactive amendment**

A retroactive legislative amendment was not unconstitutional on the basis that the amendment had referenced and applied to a particular case since the case remained pending on appeal in that the amendment had been enacted before the court of appeals issued its mandate.

U.S.—GPX Intern. Tire Corp. v. U.S., 678 F.3d 1308 (Fed. Cir. 2012).

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**(2) Legislation Affecting Pending Litigation or Adjudicated Rights**

## § 310. Control of judgments as legislative or judicial function

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2352, 2357, 2382 to 2385

**Where litigation has proceeded to a judgment determining the controversy on its merits, it is beyond the power of legislation to alter or control such judgment, and the legislature may not vacate or reverse a judicial decision.**

Where litigation has proceeded to a judgment which determines the controversy on its merits, it is beyond the power of legislation to alter or control such judgment.[1] In other words, legislative action cannot be made to retroact on past controversies which the courts in the exercise of their undoubted authority have determined.[2] Paramount to the separation-of-powers doctrine, and to the protection of the judicial branch as a coequal, distinct, and independent branch of government, is the recognition that final judgments of the judicial branch are not to be interfered with by legislative fiat.[3]

Accordingly, the legislature may not abrogate,[4] overrule,[5] or reverse[6] a judicial decision. Similarly, the legislature has no power to vacate,[7] annul,[8] set aside,[9] or supersede[10] a judgment rendered by a court. The same rule applies with respect to the decision

  

of a quasi-judicial tribunal where the decision has been regularly made and has become final under the general law relating thereto.[11]

The legislature, by creation of a legal, in recognition of a moral, obligation to pay claims for work performed for the government, does not encroach on the judicial function which the court has previously exercised in adjudicating that the obligation was not legal.[12] The force and effect of a judgment establishing a public right may be annulled by subsequent legislation although the subsequent legislation cannot take away from the particular plaintiff special damages or costs.[13]

***Validating judgment.***

The legislature has no authority to validate a defective or void order[14] or judgment,[15] especially if the defects are jurisdictional,[16] nor may it authorize a court so to do.[17] On the other hand, remedial legislation intended to cure mere irregularities or informalities in the proceedings of courts is not an usurpation of judicial functions.[18]

***Final judgment of paternity.***

The separation-of-powers doctrine is not violated by the prospective application of a statute permitting the reopening of a final judgment of paternity based on scientific evidence that the adjudged father is not the biological father.[19]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Congress may not retroactively command the federal courts to reopen final judgments. U.S.C.A. Const. Art. 3, § 1 et seq. Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016).

A statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts. U.S.C.A. Const. Art. 3, § 1 et seq. Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016).

**[END OF SUPPLEMENT]**



Footnotes

1 U.S.—Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995).
Ala.—City of Daphne v. City of Spanish Fort, 853 So. 2d 933 (Ala. 2003).
Ariz.—State v. Murray, 194 Ariz. 373, 982 P.2d 1287 (1999).
Cal.—Anderson v. Superior Court, 68 Cal. App. 4th 1240, 80 Cal. Rptr. 2d 891 (2d Dist. 1998).
Iowa—State ex rel. Lankford v. Mundie, 508 N.W.2d 462 (Iowa 1993).
Pa.—Friends of Pennsylvania Leadership Charter School v. Chester County Bd. of Assessment Appeals, 101 A.3d 66, 310 Ed. Law Rep. 1007 (Pa. 2014).
**Judicial power under Article III**
An element of the judicial power under Article III is the authority to make a conclusive decision, one not subject to legislative revision.
U.S.—Rodriguez v. Cook County, Ill., 664 F.3d 627 (7th Cir. 2011).
**Legislature cannot disregard authority of court judgment**

The legislature enjoys no constitutional prerogative to disregard the authority of a trial court judgment resolving specific controversies within the judiciary's domain.

Cal.—Mandel v. Myers, 29 Cal. 3d 531, 174 Cal. Rptr. 841, 629 P.2d 935 (1981).

2 U.S.—Personal Finance Co. of Braddock v. U.S., 86 F. Supp. 779 (D. Del. 1949).

Pa.—Com. v. Sutley, 474 Pa. 256, 378 A.2d 780 (1977).

Tenn.—Comer v. Ashe, 514 S.W.2d 730 (Tenn. 1974).

3 Pa.—Friends of Pennsylvania Leadership Charter School v. Chester County Bd. of Assessment Appeals, 101 A.3d 66, 310 Ed. Law Rep. 1007 (Pa. 2014).

4 U.S.—Resident Advisory Bd. v. Rizzo, 463 F. Supp. 694 (E.D. Pa. 1979), aff'd, 595 F.2d 1211 (3d Cir. 1979) and aff'd, 595 F.2d 1214 (3d Cir. 1979).

5 Ariz.—State v. Montes, 226 Ariz. 194, 245 P.3d 879 (2011).

Del.—Smith v. Guest, 16 A.3d 920 (Del. 2011).

Md.—Johnson v. Mayor and City Council of Baltimore, 203 Md. App. 673, 40 A.3d 475 (2012), judgment aff'd, 430 Md. 368, 61 A.3d 33 (2013).

Wash.—Port of Seattle v. Pollution Control Hearings Bd., 151 Wash. 2d 568, 90 P.3d 659 (2004).

6 U.S.—Ward v. Dixie Nat. Life Ins. Co., 595 F.3d 164, 68 A.L.R.6th 709 (4th Cir. 2010).

Del.—Smith v. Guest, 16 A.3d 920 (Del. 2011).

Mich.—General Motors Corp. v. Dep't. of Treasury, 290 Mich. App. 355, 803 N.W.2d 698 (2010).

Ohio—State v. Bodyke, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753 (2010).

Wash.—Cornelius v. Washington Dept. of Ecology, 344 P.3d 199 (Wash. 2015).

7 U.S.—Plaut v. Spendthrift Farm, Inc., 1 F.3d 1487 (6th Cir. 1993), judgment aff'd, 514 U.S. 211, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995).

Neb.—State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982).

8 U.S.—Jensen v. County of Lake, 958 F. Supp. 397 (N.D. Ind. 1997).

Mass.—Spinelli v. Com., 393 Mass. 240, 470 N.E.2d 795 (1984).

Ohio—State v. Bodyke, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753 (2010).

**Statute not in conflict with judgment**

Me.—Maine Milk Commission v. Chandler, 438 A.2d 1288 (Me. 1982).

9 U.S.—Shawnee Tribe v. U.S., 405 F.3d 1121 (10th Cir. 2005).

Ind.—Lemmon v. Harris, 949 N.E.2d 803 (Ind. 2011).

10 Mass.—In re Opinion of the Justices, 234 Mass. 612, 127 N.E. 635 (1920).

**Lower courts**

The separation-of-powers principles which preclude Congress from overruling the judgments of the supreme court have equal applicability for judgments of the lowest Article III courts.

U.S.—Cerro Metal Products v. Marshall, 467 F. Supp. 869 (E.D. Pa. 1979).

**Review or readjudication**

The legislature does not possess authority to review or to readjudicate final court judgments on a case-by-case basis.

Cal.—Mandel v. Myers, 29 Cal. 3d 531, 174 Cal. Rptr. 841, 629 P.2d 935 (1981).

11 W. Va.—Truax-Traer Coal Co. v. Compensation Com'r, 123 W. Va. 621, 17 S.E.2d 330 (1941).

12 U.S.—Pope v. U.S., 323 U.S. 1, 65 S. Ct. 16, 89 L. Ed. 3 (1944).

13 Va.—City of Norfolk v. Stephenson, 185 Va. 305, 38 S.E.2d 570, 171 A.L.R. 1344 (1946).

14 Cal.—In re Schwartz' Estate, 87 Cal. App. 2d 569, 197 P.2d 223 (2d Dist. 1948).

15 N.C.—Ange v. Owens, 224 N.C. 514, 31 S.E.2d 521 (1944).

As to the validity of acts curative of judicial proceedings, generally, see § 662.

16 Okla.—Reynolds v. Brock, 1926 OK 3, 122 Okla. 110, 250 P. 999 (1926).

17 Md.—Roche v. Waters, 72 Md. 264, 19 A. 535 (1890).

18 Cal.—In re Strong's Estate, 54 Cal. App. 2d 604, 129 P.2d 493 (3d Dist. 1942).

19 Ala.—Ex parte Jenkins, 723 So. 2d 649 (Ala. 1998).

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## § 311. Control of judgments as legislative or judicial function—Modifying or impairing judgment

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2352, 2357, 2382 to 2385

**Generally, the legislature cannot modify a judgment or impair the remedies by which it may be enforced.**

As a general rule, the legislature cannot modify a judgment or impair the remedies by which it may be enforced.[1] The legislature impermissibly interferes with judicial functions when it purports to modify the judgment of a court.[2]

Where the courts have enjoined the collection of,[3] or decreed modifications in the assessment of,[4] taxes, no subsequent statute can nullify such action. However, it has been found that it may relieve property of assessments already made for local improvements and direct that the total expense be paid by the municipality as this is not a modification of the judgment but a provision for a different manner of raising funds for its payment.[5]

  

A statute extending the period of redemption from a tax sale does not impair a judicial decree fixing the redemption period where such decree is only declaratory of existing statutory provisions.[6] The retroactive application of a statute relating to deficiency judgments to a sale previously held does not improperly interfere with judicial functions where the act deals only with the valuation of a payment in property made on account of the judgment and not with the inherent attributes of the judgment itself.[7]



Footnotes

1 Ky.—Taylor v. Asher, 317 S.W.2d 895 (Ky. 1958).
N.Y.—Underhill v. Schenck, 205 A.D. 182, 199 N.Y.S. 611 (2d Dep't 1923).
Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Scott, 346 Pa. 13, 29 A.2d 328, 144 A.L.R. 849 (1942).
**Real estate tax exemption**
A statute granting a retroactive real estate tax exemption to charter schools and nonprofit entities affiliated with charter schools violated the constitutional doctrine of separation of powers, and thus was invalid, since it interfered with a valid final judgment of the commonwealth court, which had determined that a nonprofit corporation associated with a charter school was not exempt from real estate taxes as a purely public charity.
Pa.—Friends of Pennsylvania Leadership Charter School v. Chester County Bd. of Assessment Appeals, 101 A.3d 66, 310 Ed. Law Rep. 1007 (Pa. 2014).
**Public appropriations**
The legislature could not delete an express line-item appropriation for attorney's fees as a means of rejecting the merits of a final court judgment after the plaintiff prevailed in an action against a state agency; thus, a restriction on the use of appropriated funds for the payment of particular fees was invalid.
Cal.—Mandel v. Myers, 29 Cal. 3d 531, 174 Cal. Rptr. 841, 629 P.2d 935 (1981).

2 Mass.—Doe v. Sex Offender Registry Bd., 459 Mass. 603, 947 N.E.2d 9 (2011).
Ohio—State v. Bodyke, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753 (2010).

3 Ind.—Searcy v. Patriot & B. Turnpike Co., 79 Ind. 274, 1881 WL 6810 (1881).

4 W. Va.—Ex parte Low, 24 W. Va. 620, 1884 WL 2808 (1884).

5 N.Y.—In re Lockitt, 58 Misc. 5, 110 N.Y.S. 32 (Sup 1908), aff'd, 127 A.D. 925, 111 N.Y.S. 1128 (2d Dep't 1908).

6 Ark.—Gossett v. Fordyce Lumber Co., 181 Ark. 848, 28 S.W.2d 57 (1930).

7 Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Scott, 346 Pa. 13, 29 A.2d 328, 144 A.L.R. 849 (1942).

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## § 312. Control of judgments as legislative or judicial function—Granting appeals or new trials

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2352, 2357, 2366, 2372, 2382 to 2385

**It is beyond the power of the legislature to confer a right to an appeal or writ of error in cases where no such right existed when final judgment was rendered, or where such right then existing has since been forfeited; ordinarily, it may not grant new trials or rehearings in adjudicated causes.**

A statute is unconstitutional which seeks to confer a right to an appeal or writ of error in cases where no such right existed when final judgment was rendered[1] or where such right then existing has since been forfeited.[2] The legislature may not order a case to be retried before an administrative commission on its merits where an appeal to the courts has previously been denied.[3]

It is likewise the general rule under the state constitutions that no power exists on the part of the legislature to grant new trials or rehearings,[4] and that Congress or the state legislatures may not direct the courts to reopen judgments and decrees for such

  

purpose,[5] except where the state or federal government is the only party affected.[6] On the other hand, statutes authorizing appeals from orders granting or denying a new trial have been upheld although retrospective in operation.[7]

**CUMULATIVE SUPPLEMENT**

**Cases:**

What makes a right public rather than private, such that the right can be decided by a Congressionally assigned legislative court, rather than by the Judicial Branch, is that the right is integrally related to particular federal government action. U.S.C.A. Const. Art. 3, § 1 et seq. Stern v. Marshall, 564 U.S. 462, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011).

**[END OF SUPPLEMENT]**



Footnotes

1 Ohio—State v. Bodyke, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753 (2010).
N.J.—Shade v. Colgate, 3 N.J. 91, 69 A.2d 19 (1949).
Tex.—Casparis v. Fidelity Union Cas. Co., 65 S.W.2d 404 (Tex. Civ. App. Austin 1933), writ refused.

2 Ind.—Johnson v. Gehbauer, 159 Ind. 271, 64 N.E. 855 (1902).

3 Or.—Reed v. Hunter, 150 Or. 524, 46 P.2d 595 (1935).

4 Minn.—Petition of Siblerud, 148 Minn. 347, 182 N.W. 168 (1921).
N.C.—Wilson v. Anderson, 232 N.C. 212, 59 S.E.2d 836, 18 A.L.R.2d 951 (1950).

5 U.S.—Pocono Pines Assembly Hotels Co. v. U.S., 73 Ct. Cl. 447, 1932 WL 2118 (1932).
N.C.—Wilson v. Anderson, 232 N.C. 212, 59 S.E.2d 836, 18 A.L.R.2d 951 (1950).

6 U.S.—U.S. v. Hossmann, 84 F.2d 808 (C.C.A. 8th Cir. 1936).

7 U.S.—Mallett v. State of North Carolina, 181 U.S. 589, 21 S. Ct. 730, 45 L. Ed. 1015 (1901).
**Not forbidden by United States Constitution**
There is nothing in the United States Constitution to forbid the exercise of the power to grant new trials in adjudicated cases, by the state legislature.
Or.—State v. Merten, 175 Or. 254, 152 P.2d 942 (1944).

# 16 C.J.S. Constitutional Law § 313

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.



## § 313. Aspects of trial procedure within legislative power, generally

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2357 to 2368, 2378 to 2380

**The principles governing the power of the legislature to regulate remedies and procedures apply to trial procedure, including process, pleading, time and place of trial, and costs and attorney's fees.**

The general rules governing the power of the legislature to regulate remedies and procedure have been applied in connection with trial procedure.[1] While the legislature has been found to retain the power to regulate matters of judicial procedure,[2] it has also been considered that if legislation bypasses the court's rules of pleading, practice, and procedure by setting up a procedure of its own, it violates the separation-of-powers doctrine.[3]

The enactment of statutes regulating the issue[4] and service[5] of process is, within limitations, within the authority of the legislature. For instance, a statute providing that no person belonging to the organized militia will be served with any civil process while going to, remaining at, or returning from any place at which he or she may be required to attend for military duty

  

does not violate the separation-of-powers doctrine.[6] Power likewise exists to authorize the service of process on a nonresident in attendance as a defendant in a criminal action in the state[7] and to prescribe what will constitute a general appearance in a cause.[8] However, it has also been found that the manner and timing of service of process are nonjurisdictional matters of procedure, and the legislature has no authority to interfere with a procedural rule, which is a product of the supreme court's supervisory and administrative responsibility.[9]

The legislature has the power to determine whether a litigant is the proper party to request an adjudication of a particular issue.[10] Moreover, procedural regulations with respect to the substitution of parties are not unconstitutional as exceeding the power of the legislature.[11] However, whether a party is or is not an essential or necessary party to the adjudication of a cause is ultimately a judicial, and not a legislative, question.[12] Prohibiting the joinder of a liability insurance company as a party defendant in an action to determine the liability of an insured is an invasion of the rulemaking power of the court[13] although requiring the joinder of a particular person or entity has been considered proper.[14]

***Pleading.***

The regulation of pleadings by the legislature is not a usurpation of judicial functions.[15] However, a statute obligating the court, under certain conditions, to sustain a demurrer to a bill, notwithstanding its insufficiency, would be invalid.[16]

***Terms of court.***

The legislature may prescribe the terms of court at which cases will stand for appearances or trial[17] and forbid a continuance, a discontinuance, or a nolle prosequi, without cause shown and only with the consent of the court.[18] However, in the absence of constitutional sanction, the legislature may not fix the time[19] or place[20] for the trial or hearing of a cause in such terms as to exclude the exercise of discretion by the court. Although the legislature may establish by enactment the grounds, terms, and time of a continuance,[21] it is for the court, and not for the legislature, to determine from the evidence whether cause for granting it exists.[22]

***Costs and attorney's fees.***

Legislation concerning costs and attorney's fees is not an unconstitutional invasion of the jurisdiction of the courts.[23] Thus, for instance, a statute which places a limit on the amount of fees an attorney may obtain in a medical malpractice action when he or she represents a party on a contingency fee basis is not unconstitutional as a violation of the separation-of-powers doctrine.[24]

***Authorizing defaults, dismissals, and executions.***

Generally, the legislature may prescribe conditions on which defaults may be entered[25] or actions dismissed with costs.[26] A statute providing for dismissal for failure to bring an action to trial within a specified period is not an unconstitutional interference with the judicial function.[27] Moreover, a statute requiring dismissal of an action within a specified time after service of a summons, if no answer has been filed and plaintiff has not had judgment entered, is not unconstitutional as interfering with the jurisdiction of the court to enter a default.[28] However, a statute relating to dismissal under similar conditions has been found to infringe on the court's exercise of its constitutional duties,[29] and it has also been that, under the separation-of-powers

  

doctrine, the legislature is prohibited from promulgating procedural statutes which require the dismissal of a complaint filed in full compliance with the rules of civil procedure.[30]



Footnotes

1 Fla.—Miller v. State, 225 So. 2d 409 (Fla. 1969).
Ill.—Strukoff v. Strukoff, 76 Ill. 2d 53, 27 Ill. Dec. 762, 389 N.E.2d 1170 (1979).
Okla.—Puckett v. Cook, 1978 OK 108, 586 P.2d 721 (Okla. 1978).
**Rules authorizing discovery are matter of legislative grace**
U.S.—U.S. v. Smith, 985 F. Supp. 2d 506 (S.D. N.Y. 2013).

2 Cal.—California Redevelopment Assn. v. Matosantos, 53 Cal. 4th 231, 135 Cal. Rptr. 3d 683, 267 P.3d 580 (2011).
N.Y.—LaSalle Bank, NA v. Pace, 31 Misc. 3d 627, 919 N.Y.S.2d 794 (Sup 2011), order aff'd, 100 A.D.3d 970, 955 N.Y.S.2d 161 (2d Dep't 2012).
Wash.—In re Detention of Lane, 182 Wash. App. 848, 332 P.3d 1042 (Div. 1 2014).

3 Ark.—C.B. v. State, 2012 Ark. 220, 406 S.W.3d 796 (2012).

4 Kan.—State v. Johnson, 8 Kan. App. 269, 55 P. 506 (1898).

5 Fla.—Lane v. Brith, 313 So. 2d 91 (Fla. 4th DCA 1975).
Wis.—Milwaukee County v. Schmidt, Garden and Erikson, 35 Wis. 2d 33, 150 N.W.2d 354 (1967).

6 Ark.—Cato v. Craighead County Circuit Court, 2009 Ark. 334, 322 S.W.3d 484 (2009).

7 Iowa—Frink v. Clark, 226 Iowa 1012, 285 N.W. 681 (1939).

8 Mo.—Cudahy Packing Co. v. Chicago & N.W. Ry. Co., 287 Mo. 452, 230 S.W. 82 (1921).

9 Ill.—OneWest Bank, FSB v. Markowicz, 2012 IL App (1st) 111187, 360 Ill. Dec. 233, 968 N.E.2d 726 (App. Ct. 1st Dist. 2012).

10 U.S.—Sierra Club v. Morton, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972).
**Standing**
Although the legislature cannot expand beyond constitutional limits the class of persons who possess standing, the legislature may permissibly limit the class of persons who may challenge a statutory violation.
Mich.—Miller v. Allstate Ins. Co., 481 Mich. 601, 751 N.W.2d 463 (2008).

11 U.S.—Commercial Solvents Corp. v. Jasspon, 92 F. Supp. 20 (S.D. N.Y. 1950).

12 Fla.—Snyder v. Allen, 100 Fla. 733, 129 So. 870 (1930).

13 Fla.—Cozine v. Tullo, 394 So. 2d 115 (Fla. 1981).

14 Fla.—Mercy Hospital, Inc. v. Menendez, 371 So. 2d 1077 (Fla. 3d DCA 1979).

15 Ark.—Phillips County v. Arkansas State Penitentiary, 156 Ark. 604, 247 S.W. 80 (1923).
**Filling of expert affidavit with complaint in malpractice actions**
Ga.—Walker v. Cromartie, 287 Ga. 511, 696 S.E.2d 654 (2010).

16 Tenn.—Doane v. Knoxville Inv. Corp., 159 Tenn. 76, 16 S.W.2d 186 (1929).

17 U.S.—Allen v. Sewanee Fuel & Iron Co., 268 F. 219 (E.D. Tenn. 1917).
Vt.—State v. Hodgson, 66 Vt. 134, 28 A. 1089 (1894), aff'd, 168 U.S. 262, 18 S. Ct. 80, 42 L. Ed. 461 (1897).

18 Vt.—State v. Hodgson, 66 Vt. 134, 28 A. 1089 (1894), aff'd, 168 U.S. 262, 18 S. Ct. 80, 42 L. Ed. 461 (1897).

19 U.S.—Resolute Ins. Co. v. Seventh Judicial Dist. Court of Oklahoma County, State of Okl., 336 F. Supp. 497 (W.D. Okla. 1971), judgment aff'd, 404 U.S. 997, 92 S. Ct. 558, 30 L. Ed. 2d 550 (1971).
Pa.—In re Moore, 447 Pa. 526, 291 A.2d 531 (1972).

20 Idaho—Talbot v. Collins, 33 Idaho 169, 191 P. 354 (1920).

21 Tex.—Beaumont Petroleum Syndicate v. Broussard, 64 S.W.2d 993 (Tex. Civ. App. Beaumont 1933).

22 Alaska—City of Valdez v. Valdez Development Co., 506 P.2d 1279 (Alaska 1973).
Wis.—State v. Chvala, 2003 WI App 257, 268 Wis. 2d 451, 673 N.W.2d 401 (Ct. App. 2003).

23 Ark.—State v. Ruiz, 269 Ark. 331, 602 S.W.2d 625 (1980).
Cal.—People ex rel. Dept. of Transportation v. Societa Di Unione E Beneficenza Italiana, 87 Cal. App. 3d 14, 150 Cal. Rptr. 706 (3d Dist. 1978).

Ohio—Cleveland v. State, 128 Ohio St. 3d 135, 2010-Ohio-6318, 942 N.E.2d 370 (2010).

**Legislature has broad powers to regulate attorney's fees**

Ill.—In re Marriage of Earlywine, 2013 IL 114779, 374 Ill. Dec. 947, 996 N.E.2d 642 (Ill. 2013).

24 Cal.—Roa v. Lodi Medical Group, Inc., 37 Cal. 3d 920, 211 Cal. Rptr. 77, 695 P.2d 164 (1985).

25 U.S.—James v. Appel, 192 U.S. 129, 24 S. Ct. 222, 48 L. Ed. 377 (1904).

Fla.—Lane v. Brith, 313 So. 2d 91 (Fla. 4th DCA 1975).

26 Wyo.—Barkwell v. Chatterton, 4 Wyo. 307, 33 P. 940 (1893).

27 Nev.—Volpert v. Papagna, 85 Nev. 437, 456 P.2d 848 (1969).

28 Cal.—Schultz v. Schultz, 70 Cal. App. 2d 293, 161 P.2d 36 (2d Dist. 1945).

29 N.M.—Southwest Underwriters v. Montoya, 1969-NMSC-027, 80 N.M. 107, 452 P.2d 176 (1969).

30 Miss.—Ellis v. Mississippi Baptist Medical Center, Inc., 997 So. 2d 996 (Miss. Ct. App. 2008).

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**2. Legislative Encroachment on Judiciary**

**b. Remedies and Procedure in Regard to Legislative Encroachment on Judiciary**

**(3) Aspects of Trial Procedure Within Legislative Power**

## § 314. Venue issues as within power of legislature

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2360

**Venue is generally a matter for the determination of the legislature although in the absence of a constitutional provision authorizing the legislature to act in regard to venue in a particular area, the matter has been committed exclusively to the court.**

Venue is generally a matter for the determination of the legislature.[1] However, in the absence of a constitutional provision authorizing the legislature to act in regard to venue in a particular area, the matter has been committed exclusively to the court.[2]

Acts providing for changing venue and transferring causes from one court to another are constitutional.[3] However, it is beyond the power of the legislature to authorize a change of venue on the mere motion or affidavit of a party without a judicial investigation of the grounds stated therein[4] or to restrict a right to a change of venue which is conferred by constitutional provision.[5]

  

Footnotes

1 Ark.—Clark v. Johnson Regional Medical Center, 2010 Ark. 115, 362 S.W.3d 311 (2010).
Cal.—Nguyen v. Superior Court, 49 Cal. App. 4th 1781, 57 Cal. Rptr. 2d 611 (1st Dist. 1996).

2 Pa.—North-Central Pennsylvania Trial Lawyers Ass'n v. Weaver, 827 A.2d 550 (Pa. Commw. Ct. 2003), as amended on other grounds, (June 25, 2003).

3 Ala.—Caylor v. State, 219 Ala. 12, 121 So. 12 (1929).
Okla.—Rumsey v. Diamond, 1927 OK 335, 127 Okla. 72, 259 P. 849 (1927).

4 Va.—Farmer v. Christian, 154 Va. 48, 152 S.E. 382 (1930).

5 Md.—State, for Use of Dunnigan v. Cobourn, 169 Md. 110, 179 A. 512 (1935).

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**(3) Aspects of Trial Procedure Within Legislative Power**

## § 315. Jury qualifications and challenges thereto as within power of legislature

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2363

**The legislature may by statute establish the qualifications of jurors, determine the number of jurors to be used in criminal cases, and regulate the use of peremptory challenges.**

A statute establishing the qualifications of jurors is within the power of the legislature[1] although it has been held that the courts alone are vested with constitutional authority to determine jury eligibility.[2] The determination by the legislature of the number of jurors to be used in criminal cases does not infringe on the powers of the judiciary in violation of the separation-of-powers doctrine.[3] The legislature likewise has the authority to regulate the use of peremptory challenges to jurors.[4] Where the right to a jury is substantive and not procedural, the legislature may grant the right to a jury in petty offense cases,[5] and a statute conferring a right to a jury trial in a civil action against an insurer for alleged bad faith in denying coverage or declining payment for a covered loss does not violate the separation of powers,[6] and a provision that a particular action be heard by a judge without a jury is within the prerogative of the legislature.[7]

A court rule conferring power on a court to conduct a voir dire examination cannot be defeated by statutory enactment,[8] such as by giving opposing counsel the right to conduct a voir dire examination of prospective jurors.[9] A statute permitting parties or their attorneys to directly question prospective jurors as to their qualifications, without first propounding such questions to the court, does not unduly or unnecessarily impair any function of the court.[10]



Footnotes

1 Conn.—State v. Rodriguez, 180 Conn. 382, 429 A.2d 919 (1980).

2 Ariz.—Benitez v. Dunevant, 198 Ariz. 90, 7 P.3d 99 (2000).

3 Conn.—State v. Olds, 171 Conn. 395, 370 A.2d 969 (1976).

4 Ind.—Martin v. State, 262 Ind. 232, 317 N.E.2d 430 (1974).

5 Colo.—Hardamon v. Municipal Court In and For City of Boulder, 178 Colo. 271, 497 P.2d 1000 (1972).

6 Md.—Thompson v. State Farm Mut. Auto. Ins. Co., 196 Md. App. 235, 9 A.3d 112 (2010).

7 N.C.—In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

8 Ill.—People v. Brumfield, 51 Ill. App. 3d 637, 9 Ill. Dec. 619, 366 N.E.2d 1130 (3d Dist. 1977).

9 Ill.—People v. Jackson, 69 Ill. 2d 252, 13 Ill. Dec. 667, 371 N.E.2d 602 (1977).

10 Miss.—House v. State, 133 Miss. 675, 98 So. 156 (1923).

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

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**2. Legislative Encroachment on Judiciary**

**b. Remedies and Procedure in Regard to Legislative Encroachment on Judiciary**

**(3) Aspects of Trial Procedure Within Legislative Power**

## § 316. Judicial recusal or disqualification as within power of legislature

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2367

**The legislature may prescribe the procedure for a change of judge for prejudice, and may adopt reasonable rules and regulations regarding the disqualification of judges, as long as it does not defeat or materially impair the judicial function.**

The legislature may prescribe the procedure for a change of judge[1] for prejudice.[2] The legislature may adopt reasonable rules and regulations regarding the disqualification of judges as long as it does not defeat or materially impair the judicial function.[3]

While it has been found that the legislature may not authorize a litigant or the litigant's attorney to disqualify a judge by peremptory challenge,[4] there is authority to the contrary.[5] The legislature may authorize disqualification for prejudice on the filing of an affidavit by a party, without a judicial hearing and determination of such prejudice,[6] notwithstanding some contrary authority.[7] In any event, the legislature cannot direct the change of a judicial officer, such as a special master, in a pending case.[8]

  

Footnotes

1 Ind.—Mosley v. Board of Com'rs of Marion County, 200 Ind. 515, 165 N.E. 241 (1929).

2 Cal.—People v. Rodgers, 47 Cal. App. 3d 992, 121 Cal. Rptr. 346 (4th Dist. 1975).

**Disclosure of financial interests by judges**

U.S.—Duplantier v. U.S., 606 F.2d 654 (5th Cir. 1979).

3 Cal.—People v. Superior Court (Mudge), 54 Cal. App. 4th 407, 62 Cal. Rptr. 2d 721 (2d Dist. 1997), as modified on other grounds, (May 9, 1997).

**Qualifications of judges**

Kan.—Sinclair v. Schroeder, 225 Kan. 3, 586 P.2d 683 (1978).

**A.L.R. Library**

Laws Governing Judicial Recusal or Disqualification in State Proceeding as Violating Federal or State Constitution, 91 A.L.R.5th 437.

4 Cal.—Krug v. Superior Court of City and County of San Francisco, 11 Cal. 2d 773, 77 P.2d 854 (1938).

Or.—State ex rel. Bushman v. Vandenberg, 203 Or. 326, 280 P.2d 344 (1955).

**Provision for affidavit**

A statute authorizing a litigant or his or her attorney to disqualify a judge by filing a request for a change of judge, and making no provision for the filing of an affidavit of prejudice, is unconstitutional as an unwarranted interference with the constitutional powers and duties of a judge.

Nev.—Johnson v. Goldman, 94 Nev. 6, 575 P.2d 929 (1978).

5 Wis.—State v. Holmes, 106 Wis. 2d 31, 315 N.W.2d 703 (1982).

6 Kan.—Hulme v. Woleslagel, 208 Kan. 385, 493 P.2d 541 (1972).

N.M.—State ex rel. Hannah v. Armijo, 1933-NMSC-087, 38 N.M. 73, 28 P.2d 511 (1933).

Or.—U'Ren v. Bagley, 118 Or. 77, 245 P. 1074, 46 A.L.R. 1173 (1926).

7 Alaska—Channel Flying, Inc. v. Bernhardt, 451 P.2d 570 (Alaska 1969).

8 Ariz.—San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa, 193 Ariz. 195, 972 P.2d 179 (1999).

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**b. Remedies and Procedure in Regard to Legislative Encroachment on Judiciary**

**(3) Aspects of Trial Procedure Within Legislative Power**

## § 317. Interference with respective functions of court and jury; new trial as within power of legislature

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2357, 2363, 2366, 2367

**The legislature cannot abridge the power of the judge to charge the law or direct a verdict where the facts are undisputed. In addition, legislative enactment may not abridge the power conferred on a court by the constitution to make a final determination as to whether to grant a new trial.**

A trial jury duly constituted is an adjunct of the judicial department within the terms of a constitutional prohibition of the exercise by the legislative department of powers appertaining to the judicial department.[1] Although the legislature may regulate the procedure of trial courts with respect to instructions to juries,[2] it cannot abridge the power of the judge to charge the law[3] or direct a verdict where the facts are undisputed.[4]

  

Statutes making it mandatory for courts to instruct the jury as to specific matters constitute an unconstitutional encroachment upon the judiciary under some,[5] but not all,[6] authority although the legislature may prohibit the giving of specific instructions.[7] In any event, the legislature cannot require the court to instruct the jury without regard to the evidence offered.[8]

The determination of the legal sufficiency of the evidence to establish the rights in issue is, in the absence of contrary constitutional provision, a function of the court which may not be entrusted by statute to the jury.[9] However, a statute may leave it to the jury to determine whether, under the evidence admitted in the case, a certain fact has been proved.[10] A statute which predicates criminality on negligence is not unconstitutional as requiring the jury to determine an issue of law.[11]

***New trial.***

While it is within the province of the legislature to prescribe the procedure for the hearing and determination of motions for new trial,[12] legislative enactment may not abridge the power conferred on a court by the constitution to make a final determination as to whether to grant a new trial.[13] Although the weight to be given to the verdict of the jury is a judicial matter which cannot be controlled by statute,[14] the legislature may require the court to review the sufficiency of the evidence on considering a motion for a new trial made on the ground of insufficiency of the evidence to support a verdict.[15]



Footnotes

1 Fla.—Nelson v. McMillan, 151 Fla. 847, 10 So. 2d 565 (1942).

2 Fla.—Simmons v. State, 160 Fla. 626, 36 So. 2d 207 (1948).
Miss.—Dement v. Summer, 175 Miss. 290, 165 So. 791 (1936).

3 Fla.—Simmons v. State, 160 Fla. 626, 36 So. 2d 207 (1948).
Miss.—Dement v. Summer, 175 Miss. 290, 165 So. 791 (1936).

4 Fla.—Simmons v. State, 160 Fla. 626, 36 So. 2d 207 (1948).
Mich.—People v. McMurchy, 249 Mich. 147, 228 N.W. 723 (1930).
Wis.—Thoe v. Chicago, M. & St. P. Ry. Co., 181 Wis. 456, 195 N.W. 407, 29 A.L.R. 1280 (1923).

5 Okla.—Kerr v. State, 1969 OK CR 319, 462 P.2d 268 (Okla. Crim. App. 1969).

6 N.H.—In re Southern New Hampshire Medical Center, 164 N.H. 319, 55 A.3d 988 (2012).
Tenn.—Farris v. State, 579 S.W.2d 899 (Tenn. Crim. App. 1978).
**Range of punishment**
Tenn.—State v. King, 973 S.W.2d 586 (Tenn. 1998).
**Workers' compensation**
The legislature did not exceed its authority in enacting a statute requiring that the jury in a personal injury action be instructed that the plaintiff has received workers' compensation benefits and that a procedure is in place for repaying those benefits from any damages awarded.
Nev.—Cramer v. Peavy, 116 Nev. 575, 3 P.3d 665 (2000).

7 N.H.—Gibbs v. Prior, 107 N.H. 218, 220 A.2d 151 (1966).
**Testimony of sexual assault victim**
A statute forbidding the giving of a jury instruction that a charge of sexual assault on a child is easy to make but hard to defend against is not violative of the constitutional requirement of separation-of-powers as interfering with the rulemaking power of the court.
Colo.—People v. Estorga, 200 Colo. 78, 612 P.2d 520 (1980).

8 Fla.—Simmons v. State, 160 Fla. 626, 36 So. 2d 207 (1948).

9 Colo.—Dill v. People, 94 Colo. 230, 29 P.2d 1035 (1933).
Wis.—Thoe v. Chicago, M. & St. P. Ry. Co., 181 Wis. 456, 195 N.W. 407, 29 A.L.R. 1280 (1923).

10 Ind.—Kingan & Co. Ltd. v. Clements, 184 Ind. 213, 110 N.E. 66 (1915).

Wis.—Kiley v. Chicago, M. & St. P. Ry. Co., 138 Wis. 215, 119 N.W. 309 (1909).

11 Or.—State v. Wojahn, 204 Or. 84, 282 P.2d 675 (1955).

12 Or.—Nendel v. Meyers, 162 Or. 661, 94 P.2d 680 (1939).

13 Ala.—Broadway v. State, 257 Ala. 414, 60 So. 2d 701 (1952).

N.J.—Gormley v. Gasiorowski, 110 N.J.L. 287, 164 A. 440 (N.J. Ct. Err. & App. 1933).

14 Fla.—State v. Aetna Cas. & Sur. Co., 84 Fla. 123, 92 So. 871, 24 A.L.R. 1262 (1922).

15 Ariz.—De Camp v. Central Arizona Light & Power Co., 47 Ariz. 517, 57 P.2d 311 (1936).

End of Document

# 16 C.J.S. Constitutional Law § 318

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**2. Legislative Encroachment on Judiciary**

**b. Remedies and Procedure in Regard to Legislative Encroachment on Judiciary**

**(3) Aspects of Trial Procedure Within Legislative Power**

## § 318. Effect of judgment as within power of legislature

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2357

**The legislature has authority to declare the effect of a judgment, and a statute providing for declaratory judgments or summary judgments does not encroach on the judicial power.**

The legislature has authority to declare the effect of a judgment,[1] to provide that an unpaid compensation award may be entered in the judgment docket of the court with the effect of a judgment of the court,[2] to provide for the reduction of the amount of a judgment by the amount received from collateral sources,[3] and, within constitutional limitations, to prescribe what judgments are subject to be vacated and the procedure for so doing.[4] A statute providing for declaratory judgments[5] or summary judgments[6] does not encroach on the judicial power. On the other hand, it has been found that the rendition of judgments by the courts is an inherent judicial power and may not be surrounded by legislative rules regulating such determinations.[7]

  

What is a final judgment is a question for the courts rather than the legislature,[8] and the rendition of a final decree determinative of the rights of parties in litigation is a judicial act which cannot be accomplished by legislative fiat.[9] The court has inherent power to give its reasons for its judgment in its findings of fact and to order judgment entered without interference from the legislative department.[10]



Footnotes

1 Ill.—People v. Miller, 339 Ill. 573, 171 N.E. 672 (1930).

2 Colo.—Ontario Min. Co. v. Industrial Com'n, 86 Colo. 206, 280 P. 483 (1929).

3 Fla.—Purdy v. Gulf Breeze Enterprises, Inc., 403 So. 2d 1325 (Fla. 1981).
**Medical malpractice action**
Fla.—Pinillos v. Cedars of Lebanon Hospital Corp., 403 So. 2d 365 (Fla. 1981).

4 Neb.—Mooney v. Drainage Dist. No. 1 of Richardson County, 134 Neb. 192, 278 N.W. 368 (1938).

5 Fla.—Fraser v. Cohen, 159 Fla. 253, 31 So. 2d 463 (1947).
As to imposing nonjudicial duties on the courts, see § 443.

6 Ind.—Harris v. Young Women's Christian Ass'n of Terre Haute, 250 Ind. 491, 237 N.E.2d 242 (1968).

7 Ill.—Agran v. Checker Taxi Co., 412 Ill. 145, 105 N.E.2d 713 (1952).

8 Ill.—Morris v. Beatty, 390 Ill. 568, 62 N.E.2d 478 (1945).

9 Mass.—New England Trust Co. v. Paine, 317 Mass. 542, 59 N.E.2d 263, 158 A.L.R. 262 (1945).

10 Cal.—Citizens' Nat. Trust & Savings Bank of Los Angeles v. Meserve, 33 P.2d 73 (Cal. App. 2d Dist. 1934), opinion amended on other grounds on denial of reh'g, 139 Cal. App. 89, 34 P.2d 730 (2d Dist. 1934).

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## § 319. Legislative encroachment on judiciary with respect to other matters, generally

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2350, 2352, 2353, 2357, 2370

**It may be within the power of the legislature, as against a claim of encroachment on the judiciary, to enact statutes relating to various matters, such as those regarding minors, the appropriation of funds, and the granting and revoking of licenses.**

In the application of general principles relating to the separation-of-powers and the prohibition of encroachment by the legislature on the functions of the judiciary, various acts of the legislative department have been held valid;[1] for instance, in exercising the authority expressly granted to it under the constitution, the legislature may provide a procedure for disciplining judges.[2] In addition, the legislature has the power to eliminate the elective office of jury commissioners, where they are considered county officers rather than judicial officers,[3] and the legislature may add to the duties of court commissioners which are specifically enumerated in the constitution provided such added duties are connected with the administration of justice.[4] On the other hand, other legislative acts have been held invalid;[5] for example, pursuant to the particular state constitution, the legislature does not have the power to reduce a judge's salary during the term of their appointment[6] or to enact a bill providing

  

for an electronic data processing and telecommunications commission and department which would centralize and operate all the electronic data processing and telecommunications services needed by all branches of government as it would create an agency with power to exert control over all branches of government and would lead to, among other things, an interference with the judiciary.[7]

***Minors.***

In the absence of express constitutional restrictions, the legislature may declare a minor of full age for the purpose of making contracts,[8] and may create juvenile courts by statute,[9] and may enact juvenile offender sentencing statutes.[10] However, by the express provisions of some constitutions, the appointment of guardians and curators of minors is committed to the judiciary.[11]

***Appropriation of funds; expenditures.***

The legislature is the sole and exclusive authority for the appropriation of the funds of the state, and a statute which provides for the disposition of funds arising from fines or forfeitures imposed in the courts, or from costs paid in civil or criminal cases, does not constitute an encroachment on the power of the judiciary.[12] However, the authority and responsibility of determining the necessity and propriety of expenditures from the judicial budget rests solely with the judicial branch and is not subject to legislative regulation.[13] Thus, conferring the sole discretion to make appropriations for the administration of a court upon an executive agency is an impermissible legislative encroachment on the inherent powers of the judiciary.[14]

***Creating offenses or causes of action.***

The legislature does not encroach on the judiciary by the enactment of statutes creating offenses or causes of action by prescribing the elements that will constitute such offenses or by declaring what acts will constitute a right of action, and giving a civil remedy therefor, and such statutes are valid as far as their prospective operation is concerned.[15] Thus, it is entirely within the legislature's power to define the parameters of a cause of action and to prescribe factors to take into consideration in determining liability.[16]

***Determining indebtedness or liability.***

The legislature is without power to usurp judicial functions by the enactment of a statute determining that one person is indebted to another[17] or determining the amount of indebtedness due from one person to another,[18] or from one county to another,[19] or from a municipality to an individual.[20] A dispute over the existence of legal liability in any event is a question for the courts and is not a function of the legislative body.[21]

***Granting and revoking of licenses.***

Statutes prohibiting the granting of a liquor license, on the filing of a remonstrance signed by a majority of the voters of a political subdivision of the State,[22] or vesting in a board the authority to grant or to revoke a physician's license,[23] do not constitute encroachments on the power of the judiciary and are valid.



Footnotes

1 Minn.—Reserve Min. Co. v. State, 310 N.W.2d 487 (Minn. 1981).
Pa.—In re Investigating Grand Jury of Philadelphia County, 490 Pa. 31, 415 A.2d 17 (1980).
2 Wis.—Matter of Seraphim, 97 Wis. 2d 485, 294 N.W.2d 485 (1980).
3 Pa.—Pennsylvania State Ass'n of Jury Com'rs v. Com., 621 Pa. 360, 78 A.3d 1020 (2013).
4 Wash.—Nichols v. Severtsen, 39 Wash. 2d 836, 239 P.2d 349 (1951).
5 Ariz.—Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 638 P.2d 1324 (1981).
Kan.—State ex rel. Schneider v. Kennedy, 225 Kan. 13, 587 P.2d 844 (1978).
Nev.—Goldberg v. Eighth Judicial Dist. Court In and For Clark County, 93 Nev. 614, 572 P.2d 521 (1977).
6 N.J.—DePascale v. State, 211 N.J. 40, 47 A.3d 690 (2012).
7 Mass.—Opinion of the Justices, 365 Mass. 639, 309 N.E.2d 476 (1974).
8 Mo.—Dickens v. Carr, 84 Mo. 658, 1884 WL 9113 (1884).
9 Wash.—In re Dependency of E.H., 158 Wash. App. 757, 243 P.3d 160 (Div. 2 2010).
10 Ariz.—State v. Vera, 235 Ariz. 571, 334 P.3d 754 (Ct. App. Div. 2 2014).
11 Mo.—In re Brinckwirth's Estate, 268 Mo. 86, 186 S.W. 1048 (1916).
Wash.—O'Connell v. Conte, 76 Wash. 2d 280, 456 P.2d 317 (1969).
12 Ill.—Galpin v. City of Chicago, 159 Ill. App. 135, 1910 WL 2483 (1st Dist. 1910), aff'd, 249 Ill. 554, 94 N.E. 961 (1911).
13 Ky.—Martin v. Administrative Office of Courts, 107 S.W.3d 212 (Ky. 2003).
14 Ohio—State ex rel. Johnston v. Taulbee, 66 Ohio St. 2d 417, 20 Ohio Op. 3d 361, 423 N.E.2d 80 (1981).
15 Miss.—Kelley v. State, 218 Miss. 459, 67 So. 2d 459, 44 A.L.R.2d 881 (1953).
Pa.—Com. ex rel. Lycett v. Ashe, 145 Pa. Super. 26, 20 A.2d 881 (1941).

**Cause of action for unauthorized practice of law**

Ark.—Campbell v. Asbury Automotive, Inc., 2011 Ark. 157, 381 S.W.3d 21 (2011).
16 Wash.—Davis v. Cox, 180 Wash. App. 514, 325 P.3d 255 (Div. 1 2014), review granted, 182 Wash. 2d 1008, 345 P.3d 784 (2014).
17 Md.—Harris v. Commissioners of Allegany County, 130 Md. 488, 100 A. 733 (1917).
18 Nev.—State v. Hampton, 13 Nev. 439, 1878 WL 3955 (1878).
19 Md.—Commissioners of Queen Anne's County v. Commissioners of Talbot County, 108 Md. 188, 69 A. 801 (1908).
20 U.S.—De Mello v. Fong, 164 F.2d 232 (C.C.A. 9th Cir. 1947).
21 Ga.—Koehler v. Massell, 229 Ga. 359, 191 S.E.2d 830 (1972).
22 Ind.—Hoop v. Affleck, 162 Ind. 564, 70 N.E. 978 (1904).
23 Ill.—People v. Apfelbaum, 251 Ill. 18, 95 N.E. 995 (1911).

**A.L.R. Library**

Validity and construction of state statutory provision forbidding court to stay, pending review, judgment or order revoking or suspending professional, trade, or occupational license, 42 A.L.R.4th 516.

**End of Document**

# 16 C.J.S. Constitutional Law § 320

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**2. Legislative Encroachment on Judiciary**

**c. Legislative Encroachment on Judiciary with Respect to Other Matters**

## § 320. Investigations by legislative committees

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2350, 2352, 2353, 2357, 2370

**While the legislature is without authority to conduct an investigation which is judicial in nature, it has power to conduct investigations to determine the expediency and necessity of contemplated legislation.**

Notwithstanding the constitutional prohibition of encroachment on the functions of the judiciary, each branch of the legislature has power to conduct investigations to determine the necessity and expediency of contemplated legislation.[1] In order to find that a legislative committee's investigation has exceeded the bounds of legislative power, it must be obvious that there was a usurpation of functions exclusively vested in the judiciary.[2]

A legislative body may conduct an inquiry in aid of its proper legislative functions even though the subject of inquiry may also be the proper concern of the courts and grand juries in their enforcement of the criminal laws.[3] The separation-of-powers doctrine does not prohibit a person in the legislative branch from investigating the official conduct of any person performing

  

duties in any branch of the government,[4] and inquiries by legislative committees into the administration of an executive office are not judicial in character and are therefore within the scope of legislative authorization.[5]

On the other hand, the legislative department is without authority to pass an act or resolution authorizing an investigation by a committee where such investigation is judicial in its nature.[6] The legislature may not encroach on the jurisdiction of the courts by enacting a statute suspending judicial proceedings concerning misconduct of members of the legislature, on the institution of investigatory proceedings by a legislative body.[7]



Footnotes

1 U.S.—Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).
Cal.—Parker v. Riley, 18 Cal. 2d 83, 113 P.2d 873, 134 A.L.R. 1405 (1941).
N.J.—Eggers v. Kenny, 15 N.J. 107, 104 A.2d 10 (1954).
N.Y.—In re Joint Legislative Committee to Investigate Educational System of State of New York, 285 N.Y. 1, 32 N.E.2d 769 (1941).

2 U.S.—Tenney v. Brandhove, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951).

3 N.J.—Eggers v. Kenny, 15 N.J. 107, 104 A.2d 10 (1954).

4 Ga.—Dean v. Bolton, 235 Ga. 544, 221 S.E.2d 20 (1975).

5 Mo.—State ex rel. Tolerton v. Gordon, 236 Mo. 142, 139 S.W. 403 (1911).

6 U.S.—Kilbourn v. Thompson, 103 U.S. 168, 26 L. Ed. 377, 1880 WL 18803 (1880).
Ill.—Greenfield v. Russel, 292 Ill. 392, 127 N.E. 102, 9 A.L.R. 1334 (1920).
N.J.—Ex parte Hague, 123 N.J. Eq. 475, 9 N.J. Misc. 89, 150 A. 322 (Ct. Err. & App. 1930).

7 Pa.—In re Investigation by Dauphin County Grand Jury, September, 1938, 332 Pa. 342, 2 A.2d 804 (1938).

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**3. Legislative Encroachment on Executive Branch**

## § 321. Legislative encroachment on executive branch, generally

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2390 to 2394

**In accordance with constitutional provisions separating the departments of government, the legislature cannot interfere with, or exercise any powers properly belonging to, the executive department; however, the legislature has the power to make reasonable regulations as to the performance of the duties of a constitutional officer or executive officer or agency.**

As a general rule, under constitutional principles with respect to the division of powers, legislative power as distinguished from executive power is the authority to make laws but not to enforce them.[1] Thus, statutes have been found constitutional where they do not mix the legislature's power to make laws with the executive's power to enforce laws.[2] Note, as applied to the executive, the primary purpose of the separation-of-powers clause of the constitution is to protect it from legislative encroachment.[3]

In accordance with constitutional provisions separating the departments of government, the legislature cannot interfere with, or exercise any powers properly belonging to, the executive department.[4] Thus, the legislature cannot relieve or preclude any executive officer, such as a state's governor,[5] from the performance of a duty enjoined on him or her by the constitution.[6] As otherwise expressed, the legislature cannot take away from a constitutional officer the powers or duties given that officer by the

constitution,[7] or vest such powers or functions in any other department or officer,[8] much less abolish a constitutional office in fact or in name.[9] In addition, the legislature may not interfere with the executive's power to administer appropriated funds.[10]

On the other hand, the legislature has the power to make reasonable regulations as to the performance of the duties of a constitutional officer or executive officer or agency.[11] Moreover, the legislature may prescribe duties in addition to those prescribed by the constitution, in the absence of an express prohibition;[12] may withhold executive powers from the governor by assigning them to those constitutional officers who are not amenable to his or her supervision and control;[13] and may restrain the right of an executive officer to exercise ministerial duties not imposed by the constitution.[14] In addition, it may impose reasonable limitations on the exercise of executive powers conferred by it on the executive and not inherent in the office,[15] and it may limit and define the functions of the agencies created by it.[16] Thus, for instance, the regulation and mandatory disclosure of documents in the possession of the executive branch is not invalid as an invasion of the autonomy of that branch.[17]

The legislature may engage in the performance of executive duties and functions which may properly be regarded as incidental to, and comprehended within, the scope of legislative duties,[18] and a fortiori, laws passed in obedience to a constitutional mandate are valid.[19] Thus, where a state constitution implicitly gives a legislature power over the definition of an executive department's duties, the legislature may enact a statute, approved by the voters, which transfers duties from said executive department to another executive department.[20] Furthermore, agents of the legislature may act as agents of the executive in carrying out a function which is not in its nature legislative.[21]

***Agencies and committees.***

Congress, in creating a quasi-legislative or quasi-judicial agency and fixing the period during which such agency will continue, and forbidding removal of the incumbents except for cause in the meantime, does not encroach on the executive power of the President.[22] Moreover, it is not an encroachment on the executive for the legislature to create a commission and designate its members to perform delegable legislative duties,[23] and a statute appointing a committee but not imposing any executive duties on it cannot be held unconstitutional as encroaching on the executive department.[24]

***Independent counsel.***

The Ethics in Government Act does not violate the separation-of-powers doctrine by reducing the President's ability to control prosecutorial powers exercised by the independent counsel in that the Act does not vest executive branch functions in the legislature, and provides for the executive branch, through the Attorney General, to initiate the investigation by the independent counsel, to define the counsel's jurisdiction, and to remove the counsel for cause.[25]

***Judicial officers.***

A statute which requires a judicial officer to perform what is clearly a function of the executive branch of the government violates the separation-of-powers doctrine[26] although the mere fact of cooperation between two branches of government does not establish a violation of the constitutional separation of powers.[27]

**CUMULATIVE SUPPLEMENT**

  

**Cases:**

While a contested removal is one way to assess, under constitutional separation of powers, a restriction of the President's executive power to remove an official who assists him in carrying out his duties, it is not the only way; private parties aggrieved by an official's exercise of executive power are permitted to challenge the official's authority to wield power while insulated from removal by the President. U.S. Const. art. 2, § 1, cl. 1; U.S. Const. Art. 2, § 3. Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020).

In assessing whether a congressional subpoena directed at the President's personal information is related to, and in furtherance of, a legitimate task of the Congress, courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the unique position of the President. Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020).

When Congress directs its subpoena power at the President's personal information, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose, and the more detailed and substantial the evidence of Congress's legislative purpose, the better, and that is particularly true when Congress contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency; in such cases, it is impossible to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation. Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020).

Federal Housing Finance Agency (FHFA), which oversaw Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac), was insulated to the point where Executive Branch could not control it or hold it accountable as required under Take Care Clause, in violation of Separation of Powers; under Housing and Economic Recovery Act (HERA), President could remove FHFA Director only for cause, FHFA was governed by single Director rather than multi-member body, which precluded President from influencing agency through power to designate chairs, FHFA did not have statutorily mandated requirement of bipartisan leadership, FHFA stood outside the budget in stark contrast to nearly all other administrative agencies and was thus immune from presidential control, and Cabinet Officials could not exercise any executive authority over the FHFA. U.S. Const. art. 2, § 1, cl. 1; U.S. Const. art. 3, § 1 et seq.; 12 U.S.C.A. § 4512(b)(2). Collins v. Mnuchin, 896 F.3d 640 (5th Cir. 2018).

Congress may not conduct itself as a law enforcement or trial agency, as those are functions of the executive and judicial departments. Trump v. Mazars USA, LLP, 940 F.3d 710 (D.C. Cir. 2019).

General Assembly's enactment of session law that altered appropriation of federal block grant funds proposed by Governor in recommended State budget did not violate separation of powers or faithful execution clauses of State Constitution; General Assembly did not unreasonably disrupt authority of executive branch to faithfully execute law by appropriating block grant money in manner that differed from Governor's preferred method for distributing funds, as nothing in either state or federal law made executive branch responsible for determining how monies derived from federal block grant programs should be spent. N.C. Const. art. 3, § 5(4); N.C. Const. art. 5, § 7(1). Cooper v. Berger, 376 N.C. 22, 852 S.E.2d 46 (2020).

Bill conditioning appropriation of funds to the water commission on the approval of the budget section as to the transferring of funds was unconstitutional as violative of separation of powers principles; Legislature sought to retain control over executing a law after enactment by delegating power to a committee of its own members, encroaching upon the role of the executive, and bypassing mandatory legislative process. N.D. Const. art. 4, § 13; N.D. Const. art. 5, § 9. North Dakota Legislative Assembly v. Burgum, 2018 ND 189, 916 N.W.2d 83 (N.D. 2018).

Statutes giving three state legislative committees power to intervene in action in state or federal court when party argued state statute was unconstitutional, invalid, or preempted by federal law were not facially unconstitutional under Wisconsin Constitution, despite argument that statutes violated separation of powers by encroaching on executive branch. Wis. Const. Art.

4, § 1, Wis. Const. Art. 5, § 1; Wis. Stats. §§ 13.365, 803.09(2m). Service Employees International Union, Local 1 v. Vos, 2020 WI 67, 946 N.W.2d 35 (Wis. 2020).

**[END OF SUPPLEMENT]**



Footnotes

1 U.S.—Springer v. Government of Philippine Islands, 277 U.S. 189, 48 S. Ct. 480, 72 L. Ed. 845 (1928).
Ohio—State v. Bodyke, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753 (2010).
S.C.—South Carolina Public Interest Foundation v. South Carolina Transp. Infrastructure Bank, 403 S.C. 640, 744 S.E.2d 521 (2013).

2 Ga.—Albany Surgical, P.C. v. Georgia Dept. of Community Health, 278 Ga. 366, 602 S.E.2d 648 (2004).

3 N.H.—In re Opinion Of Justices, 162 N.H. 160, 27 A.3d 859 (2011).

4 Ala.—Opinion of the Justices, 892 So. 2d 332 (Ala. 2004).
Cal.—Saltonstall v. City of Sacramento, 231 Cal. App. 4th 837, 180 Cal. Rptr. 3d 342 (3d Dist. 2014), as modified on other grounds, (Dec. 18, 2014).
N.H.—In re Opinion Of Justices, 162 N.H. 160, 27 A.3d 859 (2011).
Tex.—Texas Com'n on Environmental Quality v. Abbott, 311 S.W.3d 663 (Tex. App. Austin 2010).
**Congress may play no direct role in execution of law**
U.S.—Bowsher v. Synar, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986).
**Prosecutorial discretion**
Under the separation-of-powers doctrine, the state legislature may not move or abridge a district attorney's exclusive prosecutorial function, absent authorization by an express constitutional provision.
Tex.—In re State, 390 S.W.3d 439 (Tex. App. El Paso 2012).

5 Fla.—Bruner v. State Commission on Ethics, 384 So. 2d 1339 (Fla. 1st DCA 1980).
N.J.—General Assembly of State of N. J. v. Byrne, 90 N.J. 376, 448 A.2d 438 (1982).

6 Fla.—State ex rel. Griffin v. Sullivan, 158 Fla. 870, 30 So. 2d 919 (1947).
La.—Guidry v. Roberts, 335 So. 2d 438 (La. 1976).
**State acting as owner of funds**
N.Y.—Methodist Hosp. of Brooklyn v. State Ins. Fund, 64 N.Y.2d 365, 486 N.Y.S.2d 905, 476 N.E.2d 304 (1985).

7 Mass.—Opinion of the Justices to the Senate, 375 Mass. 827, 376 N.E.2d 1217 (1978).
Mich.—Brownstown Tp. v. Wayne County, 68 Mich. App. 244, 242 N.W.2d 538 (1976).
Wis.—Wisconsin Solid Waste Recycling Authority v. Earl, 70 Wis. 2d 464, 235 N.W.2d 648 (1975).

8 Ariz.—Hudson v. Kelly, 76 Ariz. 255, 263 P.2d 362 (1953).
Mass.—In re Opinion of the Justices to the Governor, 369 Mass. 990, 341 N.E.2d 254 (1976).

9 Ariz.—Hudson v. Kelly, 76 Ariz. 255, 263 P.2d 362 (1953).
N.M.—Thompson v. Legislative Audit Commission, 1968-NMSC-184, 79 N.M. 693, 448 P.2d 799 (1968).
**Legislature may not leave empty shell**
Although the legislature may limit the authority of the Office of the Attorney General, which is a part of the executive branch of government, it may not remove the fundamental characteristics of the office so as to leave an empty shell.
Ky.—Com. v. Johnson, 423 S.W.3d 718 (Ky. 2014).

10 N.H.—In re Opinion of the Justices, 129 N.H. 714, 532 A.2d 195 (1987).
N.C.—Advisory Opinion In re Separation of Powers, 305 N.C. 767, 295 S.E.2d 589 (1982).
Okla.—Fent v. Fallin, 2011 OK 100, 271 P.3d 798 (Okla. 2011).

11 U.S.—Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977).
Cal.—Pacific Legal Foundation v. Brown, 29 Cal. 3d 168, 172 Cal. Rptr. 487, 624 P.2d 1215 (1981).
Pa.—Lewis v. Thornburgh, 68 Pa. Commw. 157, 448 A.2d 680 (1982).
As to the control of the legislature over the authority and powers of officers, generally, see C.J.S., Officers and Public Employees § 323.

**Application of open meeting law's enforcement and investigatory provisions**

Ariz.—State ex rel. Montgomery v. Mathis, 231 Ariz. 103, 290 P.3d 1226 (Ct. App. Div. 1 2012).

12 Mass.—Opinion of the Justices to the Senate, 375 Mass. 827, 376 N.E.2d 1217 (1978).

13 Ky.—Brown v. Barkley, 628 S.W.2d 616 (Ky. 1982).

14 Tenn.—State v. Costen, 141 Tenn. 539, 213 S.W. 910 (1919).

15 U.S.—Atkins v. U. S., 214 Ct. Cl. 186, 556 F.2d 1028 (1977) (disapproved of on other grounds by, Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425 (D.C. Cir. 1982)).

Ohio—State ex rel. City of Cleveland v. Masheter, 8 Ohio St. 2d 11, 37 Ohio Op. 2d 301, 221 N.E.2d 704 (1966).

16 S.C.—Welling v. Clinton Newberry Natural Gas Authority, 221 S.C. 417, 71 S.E.2d 7 (1952).

17 U.S.—Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977).

18 La.—Guidry v. Roberts, 335 So. 2d 438 (La. 1976).

19 N.C.—Moore v. Board of Education of Iredell County, 212 N.C. 499, 193 S.E. 732 (1937).

20 Cal.—Beck v. County of Santa Clara, 204 Cal. App. 3d 789, 251 Cal. Rptr. 444 (6th Dist. 1988).

21 Mass.—Com. v. Favulli, 352 Mass. 95, 224 N.E.2d 422 (1967).

22 U.S.—Humphrey's Ex'r v. U.S., 295 U.S. 602, 55 S. Ct. 869, 79 L. Ed. 1611 (1935).

**Withdrawal of previously conferred power**

There is no transgression of separation-of-powers principles when Congress does nothing more than prospectively withdraw an agency's enforcement authority which it had previously conferred.

U.S.—American Bus Ass'n v. Rogoff, 649 F.3d 734 (D.C. Cir. 2011).

23 Cal.—Parker v. Riley, 18 Cal. 2d 83, 113 P.2d 873, 134 A.L.R. 1405 (1941).

Kan.—State ex rel. Fatzer v. Kansas Turnpike Authority, 176 Kan. 683, 273 P.2d 198 (1954).

24 Colo.—Mulnix v. Elliott, 62 Colo. 46, 156 P. 216 (1916).

**Usurpation of functions**

To find that a legislative committee's investigation has exceeded the bounds of legislative power, it must be obvious that there was a usurpation of functions exclusively vested in the executive.

U.S.—Tenney v. Brandhove, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951).

25 U.S.—Morrison v. Olson, 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988).

26 Ky.—Vaughn v. Knopf, 895 S.W.2d 566 (Ky. 1995).

27 Colo.—People v. Pate, 878 P.2d 685 (Colo. 1994).

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# 16 C.J.S. Constitutional Law § 322

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**3. Legislative Encroachment on Executive Branch**

## § 322. Performance by legislators of executive functions

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2390 to 2394

**Ordinarily, members of the legislature may not hold appointment in the administrative department of government without violating the constitutional separation-of-powers doctrine.**

Ordinarily, members of the legislature may not hold appointment in the administrative department of government without violating the constitutional separation-of-powers doctrine[1] where the service results in a usurpation of powers of another department of government by individual legislators. Thus, for instance, where under the constitution the legislative power appropriates funds and, except as to legislative and judicial appropriations, the administrative or executive power expends the money so appropriated, members of the legislature cannot be appointed to expend moneys so appropriated.[2]

On the other hand, the separation-of-powers doctrine does not in all cases prevent individual members of the legislature from serving on administrative boards or commissions[3] as where the service falls in the realm of cooperation rather than any attempt at a usurpation of executive functions.[4] In addition, a statute cannot be held invalid as conferring executive powers on the members of the legislature where the action required of the members is not of an executory nature.[5] Further, in the absence of

  

a constitutional restriction, a statute is not unconstitutional because members of the legislature may thereunder be called on to perform temporary duties which may be classed as executive or administrative.[6]



Footnotes

1 Ga.—Fowler v. Mitcham, 249 Ga. 400, 291 S.E.2d 515 (1982).
N.C.—State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).
R.I.—In re Request for Advisory Opinion from House of Representatives (Coastal Resources Management Council), 961 A.2d 930 (R.I. 2008).
**Advisory membership**
Allowing members of a legislative body to serve, even as advisory members, on a board that performs an executive function may violate the separation of powers.
Ariz.—State ex rel. Woods v. Block, 189 Ariz. 269, 942 P.2d 428 (1997).

2 Kan.—State ex rel. Schneider v. Bennett, 219 Kan. 285, 547 P.2d 786 (1976).

3 Kan.—State ex rel. Schneider v. Bennett, 219 Kan. 285, 547 P.2d 786 (1976).
S.C.—Tall Tower, Inc. v. South Carolina Procurement Review Panel, 294 S.C. 225, 363 S.E.2d 683 (1987).
**Minority membership**
A statute providing for concurrent service both on the board and in the General Assembly did not violate the state constitution's separation-of-powers requirement despite the argument that service on the board by legislators resulted in members of the legislative branch performing executive functions; since its inception, the board had never had more than two legislators serve as directors at one time on the board composed of seven members, and the composition of the board enabled it to benefit from the legislators' wisdom without being dominated by them.
S.C.—South Carolina Public Interest Foundation v. South Carolina Transp. Infrastructure Bank, 403 S.C. 640, 744 S.E.2d 521 (2013).

4 Kan.—State ex rel. Schneider v. Bennett, 219 Kan. 285, 547 P.2d 786 (1976).
S.C.—State ex rel. McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406 (1977).

5 S.C.—De Loach v. Scheper, 188 S.C. 21, 198 S.E. 409 (1938).
**Issuance of certificates of indebtedness**
Kan.—State ex rel. Schneider v. Bennett, 219 Kan. 285, 547 P.2d 786 (1976).
**Judicial nominating commission**
Utah—Matheson v. Ferry, 641 P.2d 674 (Utah 1982).

6 Ala.—Opinion of the Justices, 244 Ala. 386, 13 So. 2d 674 (1943).
Ill.—Gillespie v. Barrett, 368 Ill. 612, 15 N.E.2d 513 (1938).

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**Constitutional Law**
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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**3. Legislative Encroachment on Executive Branch**

## § 323. Reviewing and voiding executive regulations; legislative veto

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2390, 2393

**Informal coercive review by the legislature of executive rulemaking is not permissible in view of the separation-of-powers doctrine, and the use of the legislative veto to register disapproval of delegated executive action, or of administrative rulemaking, likewise violates the doctrine.**

Informal coercive review by the legislature of executive rulemaking is not permissible in view of the separation-of-powers doctrine.[1] The exercise of the power to void agency regulations by the legislature must be done while acting as a legislature, and the legislature cannot invest itself with power to act as an administrative agency.[2] The use of the legislative veto to register disapproval of delegated executive action,[3] or of administrative rulemaking,[4] violates the separation-of-powers doctrine. However, where legislative action is necessary to further a statutory scheme requiring cooperation between the two branches of the government, and such action offers no substantial potential to interfere with exclusive executive functions or alter the purposes of a statute, the legislative veto power can pass constitutional muster.[5]

  

**CUMULATIVE SUPPLEMENT**

**Cases:**

Civil Service Commission's rule, which authorized promotions between banded titles in competitive division without competitive examinations, contradicted legislative intent as expressed in Civil Service Act, as required for Legislature to veto rule pursuant to state constitution's legislative review clause; rule obviated need for Commission to administer competitive examinations that Act would otherwise have required, and rule contravened Act's requirement that Commission certify three eligible candidates based on their ranking in competitive examination. (Per Patterson, J., with three justices concurring separately.) N.J. Const. art. 5, § 4, par. 6; N.J. Stat. Ann. §§ 11A:4-1, 11A:4-8; N.J. Admin. Code 4A:3-3.2A. Communications Workers of America, AFL-CIO v. New Jersey Civil Service Commission, 234 N.J. 483, 191 A.3d 643 (2018).

**[END OF SUPPLEMENT]**



Footnotes

1 W. Va.—State ex rel. Barker v. Manchin, 167 W. Va. 155, 279 S.E.2d 622 (1981).

2 Alaska—State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).
**Rulemaking review committee**
W. Va.—State ex rel. Barker v. Manchin, 167 W. Va. 155, 279 S.E.2d 622 (1981).

3 Kan.—State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan., 264 Kan. 293, 955 P.2d 1136 (1998).
N.H.—Opinion of the Justices, 892 So. 2d 332 (Ala. 2004).
N.J.—General Assembly of State of N. J. v. Byrne, 90 N.J. 376, 448 A.2d 438 (1982).

4 U.S.—Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425 (D.C. Cir. 1982), judgment aff'd, 463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402, 77 L. Ed. 2d 1403, 77 L. Ed. 2d 1413 (1983).
**Board of Review composed of members of Congress**
Congress' conditioning of the transfer of the District of Columbia airports to local authority upon the creation of a Board of Review composed of members of Congress and having veto power over decisions of the local authority's directors violated the separation of powers.
U.S.—Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 111 S. Ct. 2298, 115 L. Ed. 2d 236 (1991).

5 N.J.—Enourato v. New Jersey Bldg. Authority, 90 N.J. 396, 448 A.2d 449 (1982).

# 16 C.J.S. Constitutional Law § 324

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**3. Legislative Encroachment on Executive Branch**

## § 324. Appointment of officers as legislative or executive function

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2391

**Generally, the power of appointment of officers is not per se an executive function, and unless the appointment of particular officers is, by the constitution, expressly conferred on the executive department or forbidden to the legislature, the latter may, by statute, vest the power of appointment in its discretion.**

It has been said that the power to select officers of the government resides primarily in the people and that such power is not an exclusive function of either the executive, legislative, or judicial branches.[1] According to some authority, however, the power of appointment to office is an executive function per se,[2] which may not be exercised, vested, or controlled by the legislature except insofar as it is a necessary incident to the exercise of legislative power[3] or is vested by the constitution in the legislature.[4] Under such authority, it has been found that the legislature can neither enforce the laws which it has the power to make nor, in the usual instance, appoint the agents charged with the duty of such enforcement.[5]

It is the more generally accepted view, however, that the power of appointment is not per se an executive function,[6] and unless the appointment of particular officers is, by the constitution, expressly conferred on the executive department or forbidden to

  

the legislature, the latter may, by statute, vest the power of appointment in its discretion[7] or provide for the mode and manner of appointment.[8] In determining whether legislative appointments violate the separation of powers, the question is whether the executive department is being subjected, directly or indirectly, to the coercive influence of the legislative department and if there is a significant interference by the legislative department with the executive department.[9] Thus, the creation of a commission, the majority of whose members are appointed by the legislature, to perform both legislative and executive functions as a cooperative venture, rather than a usurpation of power, is not a violation of the separation-of-powers doctrine.[10]

***Appointment by legislature forbidden by constitution.***

Where the constitution expressly confers the power of appointment on the executive department,[11] or expressly denies it to the legislature,[12] the latter may not appoint by enactment. However, a provision conferring the power of appointment in the executive is not violated by a statute which does not exercise the power of appointment, such as a statute regarding nonbinding recommendations to the governor.[13] A constitutional requirement that the legislature or a branch thereof should consent to appointments, being a limitation on the general grant of executive power, should be strictly construed.[14]

***Power to provide mode of appointment.***

Where the constitution provides that the mode of appointment of certain officers will be prescribed by law, it has been found that the legislature may itself make appointments.[15] Under such provision, regardless of whether the legislature may itself appoint, it may designate the officer or officers by whom the appointment will be made.[16]

***Power to prescribe qualifications.***

The legislature may have the general authority to prescribe the qualifications of officers,[17] unless they are prescribed by the constitution,[18] and in this way, it may limit the executive choice[19] even though it is without power to make the appointment or to designate the officer by whom it will be made.[20]

***Local municipal offices.***

It has been found that the legislature may not appoint officers to administer municipal affairs, its power ending with the enactment of laws prescribing the manner of selection and the duties of the officers.[21] Under other authority, an act incorporating a town and providing that named persons will act as the mayor and alderpersons until their successors are elected does not violate the constitution.[22]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Under constitutional separation of powers, while all executive power is vested in the President and the President has the authority to remove those who assist him in carrying out his duties, Congress can create expert agencies led by a group of principal officers removable by the President only for good cause. U.S. Const. art. 2, § 1, cl. 1; U.S. Const. Art. 2, § 3. Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020).

  

Assuming that an administrative law judge (ALJ) had to have the power to enforce compliance with discovery orders in order for the ALJ to be deemed an Officer of the United States for purposes of the Appointments Clause, ALJs of Securities and Exchange Commission (SEC), to whom SEC could delegate the task of presiding over enforcement proceedings, had sufficient power to enforce compliance with discovery orders; SEC ALJs could respond to discovery violations and other contemptuous conduct by excluding the wrongdoer, whether a party or a lawyer, from the proceedings, and if the offender was a lawyer the SEC ALJ could summarily suspend the lawyer from representing the client. U.S.C.A. Const. Art. 2, § 2, cl. 2; 15 U.S.C.A. § 78d–1(a); 17 C.F.R. §§ 201.110, 201.180(a)(1)(i, ii). Lucia v. S.E.C., 138 S. Ct. 2044 (2018).

**[END OF SUPPLEMENT]**



Footnotes

1 Kan.—State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan., 264 Kan. 293, 955 P.2d 1136 (1998).
Okla.—Wentz v. Thomas, 1932 OK 636, 159 Okla. 124, 15 P.2d 65 (1932).

2 N.H.—In re Petition of Governor, 151 N.H. 1, 846 A.2d 1148 (2004).
Ky.—Legislative Research Com'n By and Through Prather v. Brown, 664 S.W.2d 907 (Ky. 1984).
W. Va.—State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee, 213 W. Va. 255, 580 S.E.2d 869 (2003).

3 Fla.—In re Advisory Opinion to Governor, 276 So. 2d 25 (Fla. 1973).
La.—State ex rel. Guste v. Legislative Budget Committee, 347 So. 2d 160 (La. 1977).
Mass.—Opinion of the Justices, 365 Mass. 639, 309 N.E.2d 476 (1974).
**Confirmation of judicial appointments**
Utah—Matheson v. Ferry, 641 P.2d 674 (Utah 1982).

4 Ariz.—Lockwood v. Jordan, 72 Ariz. 77, 231 P.2d 428 (1951).
Ky.—Town of Grayson v. Bagby, 115 Ky. 651, 25 Ky. L. Rptr. 44, 74 S.W. 659 (1903).

5 Neb.—State ex rel. Shepherd v. Nebraska Equal Opportunity Com'n, 251 Neb. 517, 557 N.W.2d 684 (1997).

6 Cal.—Marine Forests Soc. v. California Coastal Com'n, 36 Cal. 4th 1, 30 Cal. Rptr. 3d 30, 113 P.3d 1062 (2005).
Conn.—Seymour v. Elections Enforcement Com'n, 255 Conn. 78, 762 A.2d 880 (2000).
N.C.—State ex rel. Martin v. Melott, 320 N.C. 518, 359 S.E.2d 783 (1987).

7 Md.—Commission on Medical Discipline v. Stillman, 291 Md. 390, 435 A.2d 747 (1981).
S.C.—Crow v. McAlpine, 277 S.C. 240, 285 S.E.2d 355, 1 Ed. Law Rep. 1004 (1981).

8 Ky.—Prater v. Com., 82 S.W.3d 898 (Ky. 2002), as amended on other grounds, (Sept. 24, 2002).
Ohio—State ex rel. Ohio AFL-CIO v. Voinovich, 69 Ohio St. 3d 225, 1994-Ohio-1, 631 N.E.2d 582 (1994), opinion clarified on other grounds, 69 Ohio St. 3d 1208, 632 N.E.2d 907 (1994).
Wash.—Gogerty v. Department of Institutions, 71 Wash. 2d 1, 426 P.2d 476 (1967).

9 Okla.—In re Application of Oklahoma Dept. of Transp., 2003 OK 105, 82 P.3d 1000 (Okla. 2003).
**Extent of legislative control of appointees**
La.—State Through Bd. of Ethics for Elected Officials v. Green, 566 So. 2d 623 (La. 1990).

10 U.S.—Parcell v. Governmental Ethics Commission, 639 F.2d 628 (10th Cir. 1980).

11 U.S.—Myers v. U.S., 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926).
Ark.—Howell v. Howell, 213 Ark. 298, 208 S.W.2d 22 (1948).
**Governor has certain constitutionally conferred appointment powers**
R.I.—In re Request for Advisory Opinion from House of Representatives (Coastal Resources Management Council), 961 A.2d 930 (R.I. 2008).

12 Ohio—State ex rel. Pogue v. Groom, 91 Ohio St. 1, 109 N.E. 477 (1914).
**Investigative commission not executive agency**
N.J.—Zicarelli v. New Jersey State Commission of Investigation, 55 N.J. 249, 261 A.2d 129 (1970), judgment aff'd, 406 U.S. 472, 92 S. Ct. 1670, 32 L. Ed. 2d 234 (1972).

13 Fla.—Schneider v. Sweetland, 214 So. 2d 338 (Fla. 1968).

14 U.S.—Myers v. U.S., 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926).

**Statute requiring confirmation by legislature was unconstitutional**

Alaska—Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

15 Ariz.—Dunbar v. Cronin, 18 Ariz. 583, 164 P. 447 (1917).

**Nominations by professional association**

Miss.—Clark v. State ex rel. Mississippi State Medical Ass'n, 381 So. 2d 1046 (Miss. 1980).

16 Mo.—State ex rel. Harvey v. Wright, 251 Mo. 325, 158 S.W. 823 (1913).

17 Ala.—Opinion of the Justices, 291 Ala. 581, 285 So. 2d 87 (1973).

Neb.—State ex rel. Quinn v. Marsh, 141 Neb. 436, 3 N.W.2d 892 (1942).

18 N.J.—Imbrie v. Marsh, 5 N.J. Super. 239, 68 A.2d 761 (App. Div. 1949), judgment aff'd, 3 N.J. 578, 71 A.2d 352, 18 A.L.R.2d 241 (1950).

Or.—Thompson v. Dickson, 202 Or. 394, 275 P.2d 749 (1954).

19 U.S.—Mow Sun Wong v. Hampton, 435 F. Supp. 37 (N.D. Cal. 1977), decision aff'd, 626 F.2d 739 (9th Cir. 1980).

N.M.—Seidenberg v. New Mexico Bd. of Medical Examiners, 1969-NMSC-028, 80 N.M. 135, 452 P.2d 469 (1969).

**De minimis restriction**

Legislation which places restrictions on state reemployment of former state officials for one year after they leave office does not violate the separation-of-powers doctrine where the regulations do not deprive the governor or general assembly of their power to make appointments; a de minimis restriction placed on the power to appoint is temporary and is not seriously intrusive of either branch's power.

R.I.—In re Advisory From the Governor, 633 A.2d 664 (R.I. 1993).

20 Fla.—State v. Daniel, 87 Fla. 270, 99 So. 804 (1924).

Mo.—State ex rel. Harvey v. Wright, 251 Mo. 325, 158 S.W. 823 (1913).

21 Iowa—State v. Barker, 116 Iowa 96, 89 N.W. 204 (1902).

22 Ga.—Lambert v. Norman, 119 Ga. 351, 46 S.E. 433 (1904).

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# 16 C.J.S. Constitutional Law § 325

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**3. Legislative Encroachment on Executive Branch**

## § 325. Removal of officers as legislative or executive function

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2391

**Although the right of the executive to remove officers may not be exercised or interfered with by the legislature, it is subject to legislative regulation.**

According to some authority, the power to remove officers is in its nature an executive power which may not be exercised by the legislature,[1] at least in the case of subordinates of the chief executive.[2] Although Congress may regulate removals as incidental to the exercise of its constitutional power to vest appointments of inferior officers in the heads of departments, so long as Congress does not exercise such power, the power of removal must remain with the President as part of the executive power. When the power of removal is in the executive department, the legislature cannot limit such power by requiring the consent of the legislature or a branch thereof[3] or by imposing certain for-cause limitations on the President's removal powers.[4] Under state law, however, an act of the legislature, limiting the right of removal by the governor to removal for a legal cause shown, has not been considered an interference with the executive function.[5]

Since the legislature is without power to declare constitutional offices vacant, a statute which provides that conviction of an officer for making an unlawful appointment will vacate his or her office does not extend to persons holding such offices.[6]

  

Moreover, where the legislature has no authority to remove an officer, a provision attached to an appropriation of money for the salary of the office by which the funds appropriated are not to be available as long as the incumbent for the time being remains in office is void as an attempt at indirect removal.[7]



Footnotes

1 Md.—Schisler v. State, 394 Md. 519, 907 A.2d 175 (2006).

2 U.S.—American Civil Liberties Union v. Holder, 652 F. Supp. 2d 654 (E.D. Va. 2009), aff'd, 673 F.3d 245 (4th Cir. 2011).
Ariz.—Citizens Clean Elections Com'n v. Myers, 196 Ariz. 516, 1 P.3d 706 (2000).

3 U.S.—Myers v. U.S., 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926).

4 U.S.—Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010).

5 N.D.—State v. Frazier, 47 N.D. 314, 182 N.W. 545 (1921).

6 Wis.—State ex rel. Buell v. Frear, 146 Wis. 291, 131 N.W. 832 (1911).

7 Mo.—State ex rel. Tolerton v. Gordon, 236 Mo. 142, 139 S.W. 403 (1911).

# 16 C.J.S. Constitutional Law § 326

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**3. Legislative Encroachment on Executive Branch**

## § 326. Invasion of power to grant clemency as legislative or judicial function

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2390, 2392

**The power to grant clemency may be lodged wherever the people determine since such power is inherent in sovereignty, and where this power has been conferred on the executive without express or implied limitations, the grant is exclusive, and the legislature can neither exercise such power itself nor interfere with or control the proper exercise thereof.**

As a general rule, the power to grant clemency may be lodged wherever the people determine since such power is inherent in sovereignty.[1] It is not necessarily an executive function, and to the extent that it is not vested by the constitution, it belongs no more to the executive branch of the government than to the legislative.[2]

On the other hand, where the power to grant clemency is conferred on the executive branch without express or implied limitations, the grant is exclusive, and the legislature can neither exercise such power itself[3] nor delegate it elsewhere.[4] Moreover, the legislature may not interfere with or control the proper exercise thereof[5] as by placing preconditions on a governor's power to grant commutations or reprieves.[6]

  

Under some authority, the legislature may prescribe procedural regulations as to the application process for pardons.[7] In addition, a statute making defendants convicted of capital felonies ineligible for recommendation of executive clemency by the department of corrections has been found not to impermissibly impinge upon the executive clemency power.[8] Moreover, even though it results in the early release of persons serving determinate sentences, a statute does not unconstitutionally intrude on the governor's commutation power where sentence reductions under the act are prompted by generalized overcrowded jail conditions and not by the unique characteristics of affected prisoners.[9]

***Remission of fines and penalties.***

The foregoing principles apply to fines and penalties which may be remitted by the legislature[10] except to the extent that the pardoning power is vested exclusively in the executive.[11]

***Acts authorizing particular sentences or acts of clemency.***

The pardoning power of the executive is not ordinarily regarded as infringed by statutes providing for deferred adjudication probation,[12] the imposition of indeterminate sentences,[13] mandatory fixed sentences[14] coupled with noneligibility for parole or probation,[15] or the granting of parole, placing on probation, or commutation of imprisonment of persons thereafter convicted[16] or by an act authorizing a suspension of sentence by the court.[17] However, the authority to pardon may not be conferred on a court under the guise of authority to release on parole or suspend sentence.[18] Moreover, a provision in a sentencing statute allowing a court to order first-degree offenders supervised for life on parole "on such conditions as the court or the board of pardons and paroles deems appropriate" creates an opportunity for the separate branches of government to contradict each other, thereby violating the separation of powers.[19]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Legislature did not infringe on governor's clemency power, in violation of separation of powers, when it decriminalized a sexually violent predator's failure to comply with his sex offender treatment program, and made such decriminalization effective as to convictions pending on appeal; legislature did not assume the power to grant clemency because decriminalizing conduct through the use of legislative amendments was not and had never been part of the executive's discretionary authority to forgive the legal consequences flowing from a conviction. Tex. Const. art. 2, § 1; Tex. Const. art. 4, § 11; Tex. Health & Safety Code Ann. §§ 841.082(a)(3), 841.085(a). Vandyke v. State, 538 S.W.3d 561 (Tex. Crim. App. 2017).

**[END OF SUPPLEMENT]**



Footnotes

1 Tex.—Ex parte Miers, 124 Tex. Crim. 592, 64 S.W.2d 778 (1933).

2 N.M.—Ex parte Bustillos., 1920-NMSC-095, 26 N.M. 449, 194 P. 886 (1920).

3 Fla.—Abdool v. Bondi, 141 So. 3d 529 (Fla. 2014).
Tex.—State ex rel. Smith v. Blackwell, 500 S.W.2d 97 (Tex. Crim. App. 1973).
**Governor has plenary clemency power except in cases of treason**

Or.—Haugen v. Kitzhaber, 353 Or. 715, 306 P.3d 592 (2013), cert. denied, 134 S. Ct. 1009, 187 L. Ed. 2d 856 (2014).

**legislation may not lessen punishment**

Legislation lessening punishment may not be applied to final convictions because this would constitute an invalid exercise by the legislature of the executive pardoning power.

N.D.—State v. Iverson, 2006 ND 193, 721 N.W.2d 396 (N.D. 2006).

4 Ill.—People ex rel. Brundage v. La Buy, 285 Ill. 141, 120 N.E. 537 (1918).

Okla.—Ex parte Swain, 88 Okla. Crim. 235, 202 P.2d 223 (1949).

5 U.S.—Schick v. Reed, 483 F.2d 1266 (D.C. Cir. 1973), judgment aff'd, 419 U.S. 256, 95 S. Ct. 379, 42 L. Ed. 2d 430 (1974).

Fla.—Sandlin v. Criminal Justice Standards & Training Com'n, 531 So. 2d 1344 (Fla. 1988).

Ohio—State ex rel. Maurer v. Sheward, 71 Ohio St. 3d 513, 1994-Ohio-496, 644 N.E.2d 369 (1994).

6 Ohio—State ex rel. Maurer v. Sheward, 71 Ohio St. 3d 513, 1994-Ohio-496, 644 N.E.2d 369 (1994).

**Disproportionality review procedures constitutional**

Ariz.—McDonald v. Thomas, 202 Ariz. 35, 40 P.3d 819 (2002).

7 Ohio—State ex rel. Maurer v. Sheward, 71 Ohio St. 3d 513, 1994-Ohio-496, 644 N.E.2d 369 (1994).

8 Fla.—Dugger v. Williams, 593 So. 2d 180 (Fla. 1991), opinion corrected on other grounds, (Feb. 27, 1992).

9 Mich.—Kent County Prosecutor v. Kent County Sheriff, 428 Mich. 314, 409 N.W.2d 202 (1987).

10 Miss.—Adams v. Fragiacomo, 71 Miss. 417, 15 So. 798 (1893).

**Requiring restoration of forfeited bail unconstitutional**

Ala.—State v. Stone, 224 Ala. 234, 139 So. 328 (1932).

11 Miss.—Pope v. Wiggins, 220 Miss. 1, 69 So. 2d 913 (1954).

12 Tex.—Busby v. State, 984 S.W.2d 627 (Tex. Crim. App. 1998).

13 Cal.—People v. Hale, 64 Cal. App. 523, 222 P. 148 (1st Dist. 1923).

14 Mass.—Com. v. McQuoid, 369 Mass. 925, 344 N.E.2d 179 (1976).

15 Ariz.—State v. Molina, 118 Ariz. 250, 575 P.2d 1276 (Ct. App. Div. 2 1978).

Fla.—Owens v. State, 316 So. 2d 537 (Fla. 1975).

N.C.—State v. Allen, 346 N.C. 731, 488 S.E.2d 188 (1997).

16 Cal.—Ex parte Collie, 38 Cal. 2d 396, 240 P.2d 275 (1952).

Ill.—People v. Cohen, 307 Ill. 87, 138 N.E. 294 (1923).

**Eligibility for parole**

La.—Bosworth v. Whitley, 627 So. 2d 629 (La. 1993).

17 Tenn.—Howe v. State ex rel. Pyne, 170 Tenn. 571, 98 S.W.2d 93 (1936).

Va.—Richardson v. Com., 131 Va. 802, 109 S.E. 460 (1921).

Wash.—State v. Starwich, 119 Wash. 561, 206 P. 29, 26 A.L.R. 393 (1922).

18 Ala.—Montgomery v. State, 231 Ala. 1, 163 So. 365, 101 A.L.R. 1394 (1935).

Ky.—Huggins v. Caldwell, 223 Ky. 468, 3 S.W.2d 1101 (1928).

Miss.—State v. Jackson, 143 Miss. 745, 109 So. 724 (1926).

19 Ariz.—State v. Wagstaff, 164 Ariz. 485, 794 P.2d 118 (1990).

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**4. Delegation of Powers**

**a. In General**

## § 327. Legislative powers

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2400, 2401, 2433, 2436, 2443, 2444

**The legislature may not delegate core legislative powers in the absence of constitutional authorization.**

In the absence of an express or clearly implied authorization in the constitution,[1] the functions of the legislature that are fundamental legislative functions, such as making the law, must be exercised by it alone and cannot be delegated[2] even to its own committees or committee chairpersons.[3]

This nondelegation doctrine insures the protection of citizens against discriminatory and arbitrary actions of public officials, and it provides the assurance that duly authorized, politically accountable officials make fundamental policy decisions.[4] Thus, the nondelegation doctrine is not to be construed as prohibiting entirely the delegation of legislative power; rather, the doctrine prohibits only unreasonable delegations of legislative power.[5]

  

***Intelligible principle.***

Not all delegations of legislative authority are prohibited under the nondelegation doctrine; so long as the legislative body lays down an "intelligible principle" to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power.[6] The delegation of legislative power meets the intelligible principle test if it clearly delineates the general policy, the public agency that is to apply it, and the boundaries of the delegated authority.[7]

Ordinarily, the delegation of state sovereign power is a matter of state constitutional law, and the Federal Constitution is not implicated in any way.[8]

The legislature may not delegate its power to create inferior courts;[9] to create or define offenses and prescribe the punishment thereof[10] or any other fundamental or basic power,[11] such as the power to suspend a law;[12] to amend[13] or repeal[14] Legislation; to appropriate funds;[15] or to decide what will be investigated during the interim period between legislative sessions.[16] However, the limitations on the authority to delegate legislative power are less stringent in cases where the entity exercising delegated authority itself possesses independent authority over the subject matter.[17]

On the other hand, any power not legislative in character which the legislature may exercise, it may delegate.[18] Additionally, while a legislature cannot completely delegate its lawmaking power to any other body, it may allow another body to fill in the details of legislation already enacted.[19]

In order for a statute to be void as unconstitutionally delegating legislative power, it must clearly appear that the power in question is purely legislative,[20] and it must appear to what person or body such power is delegated.[21] Provision for public sanctions does not convert an otherwise constitutional grant of authority into an unconstitutional delegation of legislative power.[22]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Accompanying the Constitution's assignment of all legislative power to Congress is a bar on its further delegation, and Congress may not transfer to another branch powers which are strictly and exclusively legislative. (Per Justice Kagan, with three Justices concurring and one Justice concurring in the judgment). U.S. Const. art. 1, § 1. Gundy v. United States, 139 S. Ct. 2116 (2019).

In determining whether a statutory delegation of authority by Congress violates the Constitution's assignment of all legislative power to Congress, the nondelegation inquiry always begins and often almost ends with statutory interpretation, because the constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion, and the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. (Per Justice Kagan, with three Justices concurring and one Justice concurring in the judgment). U.S. Const. art. 1, § 1. Gundy v. United States, 139 S. Ct. 2116 (2019).

**[END OF SUPPLEMENT]**

Footnotes

1 Kan.—State ex rel. Dix v. Board of Ed., 215 Kan. 551, 527 P.2d 952 (1974).
N.D.—Stutsman County v. State Historical Soc. of North Dakota, 371 N.W.2d 321 (N.D. 1985).

2 U.S.—Loving v. U.S., 517 U.S. 748, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996).
Ariz.—Cook v. State, 230 Ariz. 185, 281 P.3d 1053 (Ct. App. Div. 1 2012).
Ill.—Chicagoland Chamber of Commerce v. Pappas, 378 Ill. App. 3d 334, 317 Ill. Dec. 113, 880 N.E.2d 1105 (1st Dist. 2007).
Minn.—Coalition of Greater Minnesota Cities v. Minnesota Pollution Control Agency, 765 N.W.2d 159 (Minn. Ct. App. 2009).
Ohio—State v. Gill, 63 Ohio St. 3d 53, 584 N.E.2d 1200 (1992).
Pa.—Pennsylvania State Ass'n of Jury Com'rs v. Com., 621 Pa. 360, 78 A.3d 1020 (2013).
S.C.—Martinez v. State, 323 S.W.3d 493 (Tex. Crim. App. 2010).
Wash.—Brower v. State, 137 Wash. 2d 44, 969 P.2d 42 (1998).

3 N.H.—Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981).
N.Y.—New York Public Interest Research Group, Inc. v. Carey, 86 Misc. 2d 329, 383 N.Y.S.2d 197 (Sup 1976), order aff'd, 55 A.D.2d 274, 390 N.Y.S.2d 236 (3d Dep't 1976).
N.C.—Advisory Opinion In re Separation of Powers, 305 N.C. 767, 295 S.E.2d 589 (1982).

4 R.I.—Newport Court Club Associates v. Town Council of the Town of Middletown, 800 A.2d 405 (R.I. 2002).

5 R.I.—Thompson v. Town of East Greenwich, 512 A.2d 837 (R.I. 1986).

6 U.S.—U.S. v. Kuehl, 706 F.3d 917 (8th Cir. 2013); U.S. v. Nichols, 775 F.3d 1225 (10th Cir. 2014).
Me.—Friends of Maine's Mountains v. Board of Environmental Protection, 2013 ME 25, 61 A.3d 689 (Me. 2013).
Mo.—Roe v. Replogle, 408 S.W.3d 759 (Mo. 2013).

7 Mo.—Roe v. Replogle, 408 S.W.3d 759 (Mo. 2013).

8 U.S.—Mann v. Powell, 333 F. Supp. 1261 (N.D. Ill. 1969).
Iowa—Gamel v. Veterans Memorial Auditorium Commission, 272 N.W.2d 472 (Iowa 1978).

9 Va.—McCurdy v. Smith, 107 Va. 757, 60 S.E. 78 (1908).
Wis.—State v. Sawyer County Board of Supervisors, 140 Wis. 634, 123 N.W. 248 (1909).

10 Colo.—People v. Lepik, 629 P.2d 1080 (Colo. 1981).
La—State v. All Pro Paint & Body Shop, Inc., 639 So. 2d 707 (La. 1994).
Miss.—State v. Russell, 358 So. 2d 409 (Miss. 1978).
**Congress**
No absolute rule bars Congress's delegation of authority to define criminal punishments, and exercise of delegated authority to define crimes may be sufficient in certain circumstances to supply notice to defendants which the Constitution requires.
U.S.—Loving v. U.S., 517 U.S. 748, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996).

11 Cal.—California State Employees' Assn. v. Flournoy, 32 Cal. App. 3d 219, 108 Cal. Rptr. 251 (2d Dist. 1973).
N.Y.—Citizens for an Orderly Energy Policy, Inc. v. Cuomo, 78 N.Y.2d 398, 576 N.Y.S.2d 185, 582 N.E.2d 568 (1991).
Wash.—State ex rel. Everett Fire Fighters Local No. 350 v. Johnson, 46 Wash. 2d 114, 278 P.2d 662 (1955).

12 Ala.—Opinion of the Justices, 345 So. 2d 1354 (Ala. 1977).
Wash.—Diversified Inv. Partnership v. Department of Social and Health Services, 113 Wash. 2d 19, 775 P.2d 947 (1989).

13 Ala.—Freeman v. City of Mobile, 761 So. 2d 235 (Ala. 1999).

14 Ala.—Freeman v. City of Mobile, 761 So. 2d 235 (Ala. 1999).
Ark.—Nahlen v. Woods, 255 Ark. 974, 504 S.W.2d 749 (1974).
Wash.—Diversified Inv. Partnership v. Department of Social and Health Services, 113 Wash. 2d 19, 775 P.2d 947 (1989).

  

15 Del.—State v. American Federation of State, County and Municipal Emp., AFL-CIO Local 1726, Division of Adult Correction, 298 A.2d 362 (Del. Ch. 1972).
Ill.—Quinn v. Donnewald, 107 Ill. 2d 179, 90 Ill. Dec. 898, 483 N.E.2d 216 (1985).

16 Fla.—Johnston v. Gallen, 217 So. 2d 319 (Fla. 1969).

17 U.S.—U. S. v. Mazurie, 419 U.S. 544, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975).
Mont.—Duck Inn, Inc. v. Montana State University-Northern, 285 Mont. 519, 949 P.2d 1179, 123 Ed. Law Rep. 351 (1997).

18 U.S.—Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S. Ct. 869, 84 L. Ed. 1108 (1940).
Kan.—State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan., 264 Kan. 293, 955 P.2d 1136 (1998).
Ky.—Legislative Research Com'n By and Through Prather v. Brown, 664 S.W.2d 907 (Ky. 1984).

19 Ariz.—Cook v. State, 230 Ariz. 185, 281 P.3d 1053 (Ct. App. Div. 1 2012).
S.C.—Hampton v. Haley, 403 S.C. 395, 743 S.E.2d 258 (2013).

20 N.D.—Stutsman County v. State Historical Soc. of North Dakota, 371 N.W.2d 321 (N.D. 1985).
Vt.—Stowe Citizens for Responsible Government v. State, 169 Vt. 559, 730 A.2d 573, 135 Ed. Law Rep. 193 (1999).
Wash.—Diversified Inv. Partnership v. Department of Social and Health Services, 113 Wash. 2d 19, 775 P.2d 947 (1989).
**Doctrine not construed too broadly**
S.C.—De Loach v. Scheper, 188 S.C. 21, 198 S.E. 409 (1938).
**Liberal interpretation**
Iowa—Miller v. Schuster, 227 Iowa 1005, 289 N.W. 702 (1940).

21 Ark.—Merritt v. No Fence Dist. No. 2 of Jefferson County, 205 Ark. 1129, 172 S.W.2d 684 (1943).
Pa.—Com. v. Sweeney, 61 Pa. Super. 367, 1915 WL 673 (1915).

22 Cal.—Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 55 Cal. Rptr. 23, 420 P.2d 735 (1966).

**End of Document**

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**Constitutional Law**
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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**4. Delegation of Powers**

**a. In General**

## § 328. Administration of the law

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2400, 2401, 2433, 2436, 2443, 2444

**While the legislature may not delegate the exercise of its discretion as to what the law will be, it may confer discretion in the administration of the law.**

While the legislature may not delegate the exercise of its discretion as to what the law will be, it may confer discretion in the administration of the law,[1] and the legislature has the necessary resources of flexibility and practicality which will enable it to perform its function in laying down policies and establishing standards while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.[2] Hence, the legislature may make a law to delegate a power to determine some fact or state of things on which the law makes or intends to make its own action depend.[3]

The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it will be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law.

  

While the first cannot be done, to the latter no valid objection can be made.[4] In order to hold a statute invalid as an unlawful delegation of legislative power, it must be clear that without the exercise of legislative power by the person or body to whom the delegation has been made, the statute remains incomplete so that the legislative will has not been fully made known.[5] A legislative enactment is complete if it contains a full expression of legislative policy and sufficient procedural safeguards to protect against arbitrary application.[6]

The legislature cannot directly or indirectly delegate the power to do that which the legislature itself cannot do.[7] Moreover, while the legislature may of course exercise the power which it delegates to others,[8] this does not mean that it may delegate a power to itself and, in the process, escape from such constitutional constraints under which it must operate.[9]

***Investigations of Executive Branch misconduct.***

It is within congressional authority to create a Special Division, with the authority to appoint an independent counsel upon recommendation by the Attorney General, to investigate misconduct in the Executive Branch.[10]

***Creation of corporations.***

The legislature cannot delegate the power to create corporations to a court or other tribunal or to an executive or administrative officer or body.[11] However, this does not prevent the legislature from itself creating corporations either by special or general laws and delegating to a court, board, or officer judicial or ministerial authority with respect to their formation or organization[12] but only if adequate standards are provided for the administrative action.[13]

**CUMULATIVE SUPPLEMENT**

**Cases:**

While the Constitution assigns all legislative power to Congress, it does not deny to Congress the necessary resources of flexibility and practicality that enable it to perform its functions, and Congress may obtain the assistance of its coordinate Branches, and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws. (Per Justice Kagan, with three Justices concurring and one Justice concurring in the judgment). U.S. Const. art. 1, § 1. Gundy v. United States, 139 S. Ct. 2116 (2019).

In every case, the function of the judiciary is to apply the law, not to rewrite it to conform with the policy positions of litigants. U.S. v. Surratt, 797 F.3d 240 (4th Cir. 2015).

**[END OF SUPPLEMENT]**



Footnotes

1 U.S.—Randolph v. U.S., 274 F. Supp. 200 (M.D. N.C. 1967), judgment aff'd, 389 U.S. 570, 88 S. Ct. 695, 19 L. Ed. 2d 785 (1968).
Colo.—People In Interest of D.G., 733 P.2d 1199 (Colo. 1987).
Ill.—People v. Guest, 115 Ill. 2d 72, 104 Ill. Dec. 698, 503 N.E.2d 255 (1986).
As to delegation of legislative power to administrative agencies, generally, see §§ 340 to 354.

**Ministerial powers may be delegated**

Fla.—Orange City Water Co. v. Town of Orange City, 188 So. 2d 306 (Fla. 1966).

Ind.—Hendricks County Bd. of Com'rs v. Rieth-Riley Const. Co., Inc., 868 N.E.2d 844 (Ind. Ct. App. 2007).

Iowa—Wharton v. Iowa Bd. of Parole, 463 N.W.2d 416 (Iowa 1990).

La.—Louisiana Municipal Association v. State, 893 So. 2d 809 (La. 2005).

2 U.S.—U.S. v. Mead Corp., 533 U.S. 218, 121 S. Ct. 2164, 150 L. Ed. 2d 292, 3 A.L.R. Fed. 2d 651 (2001); Yakus v. U. S., 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).

Fla.—Sloban v. Florida Bd. of Pharmacy, 982 So. 2d 26 (Fla. 1st DCA 2008).

Tex.—State v. Rhine, 255 S.W.3d 745 (Tex. App. Fort Worth 2008), petition for discretionary review granted, (Aug. 20, 2008) and judgment aff'd, 297 S.W.3d 301 (Tex. Crim. App. 2009).

As to the necessity for standards, generally, see § 329.

**Power to create instrumentalities**

Ohio—City of Heath v. Licking County Regional Airport Authority, 16 Ohio Misc. 69, 45 Ohio Op. 2d 68, 237 N.E.2d 173 (C.P. 1967).

**Creation of investigative committees**

Pa.—Annenberg v. Roberts, 333 Pa. 203, 2 A.2d 612 (1938).

**No delegation to nongovernmental agencies**

U.S.—Dahlberg v. Pittsburgh & L. E. R. Co., 138 F.2d 121 (C.C.A. 3d Cir. 1943).

3 Colo.—People v. Moseley, 193 Colo. 256, 566 P.2d 331 (1977).

Ga.—Banks v. Georgia Power Co., 267 Ga. 602, 481 S.E.2d 200 (1997).

Ind.—Stanton v. Smith, 429 N.E.2d 224 (Ind. 1981).

4 U.S.—U.S. v. Pastor, 557 F.2d 930 (2d Cir. 1977).

Neb.—Blackledge v. Richards, 194 Neb. 188, 231 N.W.2d 319 (1975).

Ohio—Peachtree Development Co. v. Paul, 67 Ohio St. 2d 345, 21 Ohio Op. 3d 217, 423 N.E.2d 1087 (1981).

**Finding facts or creating conditions constituting facts**

(1) A legislature can make the application or operation of a statute complete within itself dependent upon the existence of certain facts or conditions, the ascertainment of which is left to the administrative agency, and in doing so, the legislature vests the agency with mere fact-finding authority and not the authority to legislate, and the agency is only authorized to determine facts which will make the statute effective.

Nev.—Sheriff, Clark County v. Luqman, 101 Nev. 149, 697 P.2d 107 (1985).

(2) Legislation permitting landowners with property located on the boundary of a city to withdraw that property from the jurisdiction of the city constituted an unconstitutional delegation of legislative authority to private individuals; the legislation contained no criteria or expression of legislative policy as to how that delegated authority was to be exercised by the land-owners, and legislation delegated to self-interested private landowners the fact-finding function of determining their own eligibility under the law without any meaningful procedural safeguards.

Or.—City of Damascus v. Brown, 266 Or. App. 416, 337 P.3d 1019 (2014).

5 N.H.—Ferretti v. Jackson, 88 N.H. 296, 188 A. 474 (1936).

Or.—Foeller v. Housing Authority of Portland, 198 Or. 205, 256 P.2d 752 (1953).

S.C.—De Loach v. Scheper, 188 S.C. 21, 198 S.E. 409 (1938).

6 Or.—City of Damascus v. Brown, 266 Or. App. 416, 337 P.3d 1019 (2014).

**Effect of completeness of statute**

Completeness of a statute is one of strongest proofs that no delegation of power was intended.

Colo.—Sapero v. State Bd. of Medical Examiners, 90 Colo. 568, 11 P.2d 555 (1932).

Fla.—State v. Fowler, 94 Fla. 752, 114 So. 435 (1927).

Ga.—Holcombe v. Georgia Milk Producers Confederation, 188 Ga. 358, 3 S.E.2d 705 (1939).

**Power used as far as possible**

For delegation of legislative power to be valid, a lawmaking body must use the power as far as possible before delegating residue.

U.S.—F G Vogt & Sons v. Rothensies, 11 F. Supp. 225 (E.D. Pa. 1935).

7 Fla.—Thomas v. State ex rel. Cobb, 58 So. 2d 173, 34 A.L.R.2d 140 (Fla. 1952).

N.H.—State v. Cox, 91 N.H. 137, 16 A.2d 508 (1940), aff'd, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, 133 A.L.R. 1396 (1941).

  

Wash.—Kueckelhan v. Federal Old Line Ins. Co. (Mut.), 69 Wash. 2d 392, 418 P.2d 443 (1966).

8 U.S.—U.S. Sugar Equalization Board v. P. De Ronde & Co., 7 F.2d 981 (C.C.A. 3d Cir. 1925).
N.J.—Mayor, City Council, Bd. of Public Works of City of Elizabeth v. New Jersey Turnpike Authority, 7 N.J. Super. 540, 72 A.2d 399 (Ch. Div. 1950).
Tex.—Texas Highway Commission v. El Paso Bldg. & Const. Trades Council, 149 Tex. 457, 234 S.W.2d 857 (1950).

9 Alaska—State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).

10 U.S.—Morrison v. Olson, 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988).

11 Minn.—State v. Great Northern Ry. Co., 100 Minn. 445, 111 N.W. 289 (1907).

12 Or.—Petition of Board of Directors of Tillamook People's Utility Dist., 160 Or. 530, 86 P.2d 460 (1939).

13 U.S.—Smith v. Ladner, 288 F. Supp. 66 (S.D. Miss. 1968).
As to requirement of standards, generally, see § 329.

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# 16 C.J.S. Constitutional Law § 329

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**4. Delegation of Powers**

**a. In General**

## § 329. Standards to guide discretion

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2407

**A statute delegating legislative power must establish a definite and certain policy and rule of action for the guidance of the instrumentality that is to administer the law.**

It is necessary and sufficient that a statute delegating legislative power establish a sufficient basic standard, a definite and certain policy and rule of action for the guidance of the instrumentality that is to administer the law,[1] such that one reviewing action taken by the delegee could recognize whether the legislative will has been obeyed.[2] A statute containing a delegation of legislative power must be read as a whole to ascertain whether adequate standards exist,[3] and the governing standards need not be expressed in the delegating statute itself if they can be reasonably ascertained from the statutory scheme as a whole.[4] Where it is not feasible to supply precise standards without frustrating the purposes of the particular legislation, the presence of adequate procedural safeguards to protect against an abuse of discretion by those to whom the power is delegated compensates substantially for the want of precise guidelines.[5]

  

A statement of a definite policy and a rule will not save a delegation if the statute expressly authorized the official to follow it or not as his or her judgment may dictate, even though the official is to act on expert advice,[6] and a sweeping and general delegation of legislative power with uncontrolled or unrestricted discretion exceeds constitutional limits.[7] Moreover, a law which vests any person with discretion which is purely arbitrary and which gives him or her the power to determine what the law will be in a particular case is invalid.[8] Some authority goes so far as to say that the statute must be so complete that nothing is left to the judgment of the legislature's delegate or appointee.[9]

The fact that a third party, whether private or governmental, performs some role in the application and implementation of an established legislative scheme does not render the legislation invalid as an unlawful delegation.[10] The legislature also has power, when enacting a statute creating a new right with its remedy, to vest in some board or person power to adjudicate all matters arising under the statute and to make such adjudication final and conclusive.[11]



Footnotes

1 U.S.—Grymes Hill Manor Estates v. U. S., 179 Ct. Cl. 466, 373 F.2d 920 (1967).
Fla.—Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004).
Mass.—Tri-Nel Management, Inc. v. Board of Health of Barnstable, 433 Mass. 217, 741 N.E.2d 37 (2001).
**Appropriate standards**
Discretion as to execution of law can be delegated by the legislature to a state agency as long as reasonable guidelines are provided; such guidance must include appropriate standards by which the administrative body is to exercise this power.
Ariz.—Hobbs v. Jones, 2012 Ark. 293, 412 S.W.3d 844 (2012).

2 U.S.—American Council of Life Insurers v. District of Columbia Health Benefit Exchange Authority, 2014 WL 5893464 (D.D.C. 2014).
Utah—Utah Ass'n of Counties v. Bush, 316 F. Supp. 2d 1172, 11 A.L.R. Fed. 2d 917 (D. Utah 2004).

3 U.S.—Carlson v. Landon, 342 U.S. 524, 72 S. Ct. 525, 96 L. Ed. 547 (1952).
Colo.—Lloyd A. Fry Roofing Co. v. State Dept. of Health Air Pollution Variance Bd., 179 Colo. 223, 499 P.2d 1176 (1972).

4 Ariz.—Burns v. Herberger, 17 Ariz. App. 462, 498 P.2d 536 (Div. 1 1972) (overruled on other grounds by, Golder v. Department of Revenue, State Bd. of Tax Appeals, 123 Ariz. 260, 599 P.2d 216 (1979)).
N.J.—State v. Smith, 130 N.J. Super. 442, 327 A.2d 462 (Law Div. 1974).

5 Me.—State v. Boynton, 379 A.2d 994 (Me. 1977).
**General standards permissible**
Under the separation of powers principle of the Kentucky Constitution, the General Assembly need prescribe only sufficient standards to prevent the agency from exercising unfettered discretion.
U.S.—Maxwell's Pic-Pac, Inc. v. Dehner, 739 F.3d 936 (6th Cir. 2014).
**Technical areas**
(1) In certain technical areas in which flexibility is required to enable an administrative agency to adapt to changing conditions, it is not necessary that the legislature provide precise guidelines to an agency charged with carrying out the policies embodied in a legislative delegation of power; instead, it is sufficient if the legislature confers broad power upon the agency to fulfill the policy goals embodied in the statute, leaving it up to the agency itself to promulgate the necessary regulatory details.
N.Y.—Kigin v. State Workers' Compensation Bd., 109 A.D.3d 299, 970 N.Y.S.2d 111 (3d Dep't 2013), leave to appeal granted, 22 N.Y.3d 854, 977 N.Y.S.2d 183, 999 N.E.2d 548 (2013) and aff'd, 24 N.Y.3d 459, 999 N.Y.S.2d 800, 24 N.E.3d 1064 (2014).
(2) The standards that guide an administrative agency to which legislative authority has been delegated must be as reasonably precise as the subject matter requires or permits, but general terms are permissible if those terms get precision from technical knowledge or sense and experience and thereby become reasonably certain.

Va.—Elizabeth River Crossings OpCo, LLC v. Meeks, 286 Va. 286, 749 S.E.2d 176 (2013).

6 U.S.—F G Vogt & Sons v. Rothensies, 11 F. Supp. 225 (E.D. Pa. 1935).

7 Fla.—Sims v. State, 754 So. 2d 657 (Fla. 2000).
N.H.—Smith Ins., Inc. v. Grievance Committee, 120 N.H. 856, 424 A.2d 816 (1980).
S.D.—Moran v. Rapid City Area School Dist. No. 51-4, Pennington and Meade Counties, 281 N.W.2d 595 (S.D. 1979).

8 Ala.—Mead v. Eagerton, 255 Ala. 66, 50 So. 2d 253 (1951).
Neb.—McGraw Elec. Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 160 Neb. 319, 68 N.W.2d 608 (1955).
Or.—Foeller v. Housing Authority of Portland, 198 Or. 205, 256 P.2d 752 (1953).

9 Fla.—State v. Fowler, 94 Fla. 752, 114 So. 435 (1927).
Ky.—Preston v. Clements, 313 Ky. 479, 232 S.W.2d 85 (1950).
Ohio—Neuweiler v. Kauer, 62 Ohio L. Abs. 536, 107 N.E.2d 779 (C.P. 1951).

10 Cal.—Kugler v. Yocum, 69 Cal. 2d 371, 71 Cal. Rptr. 687, 445 P.2d 303 (1968).

11 S.C.—Stovall v. Sawyer, 181 S.C. 379, 187 S.E. 821 (1936).
Wash.—In re Gifford, 192 Wash. 562, 74 P.2d 475, 114 A.L.R. 348 (1937).

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# 16 C.J.S. Constitutional Law § 330

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**4. Delegation of Powers**

**a. In General**

## § 330. Conditional and contingent legislation

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2446

**Where an act is clothed with all the forms of law and is complete in and of itself, it is within the scope of the legislative power to prescribe that it will become operative only on the happening of some specified contingency. The legislature may delegate to some agency the power to determine the stated event provided such determination is made under reasonable standards and is not arbitrary.**

As a general rule, where an act is clothed with all the forms of law and is complete in and of itself, it is fairly within the scope of the legislative power to prescribe that it will become operative only on the happening of some specified contingency,[1] contingencies, or succession of contingencies.[2] Such a statute lies dormant until called into active force by the existence of the conditions on which it is intended to operate.[3]

  

The legislature must itself fix the condition or event on which the statute is to operate, but it may confide to some suitable agency the fact-finding function as to whether the condition exists,[4] or the power to determine, or the discretion to create, the state event[5] provided such determination is made under reasonable standards[6] and is not arbitrary.[7]

The condition may consist of the determination of some fact or state of things on the part of the people or a municipality or other body or officers,[8] or it may consist of some act or acts to be performed by public offices or bodies,[9] or by the people or parties interested,[10] except that the execution of a statute may not be conditioned on the unbridled discretion of a single individual or any unduly limited group of individuals.[11]

Statutes have been upheld which have authorized certain individuals to take the initiative in invoking the application of the statute,[12] as by petition,[13] required consent to certain regulations by the individuals affected,[14] or made the right to do certain things dependent on the consent of affected individuals,[15] such as property owners.[16] On the other hand, some statutes conditioned on the acts of certain persons have been ruled invalid on the theory that the legislature has no power to make laws which by their terms become and are or are not effective at the pleasure of individuals.[17]

In any case, as a general rule, the enactment of the statute itself may not be made contingent on the action of officers or people; the act must be complete in itself, must be made law by the legislature, and only its effect and operation may be made dependent on the contingency.[18] However, some difference of opinion exists as to whether the legislature may make the enactment of a law dependent on its approval by a vote of the people of the entire state, in the absence of constitutional sanction for a popular referendum.[19]



Footnotes

1 U.S.—Atkins v. U. S., 214 Ct. Cl. 186, 556 F.2d 1028 (1977) (disapproved of on other grounds by, Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425 (D.C. Cir. 1982)).
Ind.—Hendricks County Bd. of Com'rs v. Rieth-Riley Const. Co., Inc., 868 N.E.2d 844 (Ind. Ct. App. 2007).
S.C.—Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999).
Vt.—State v. Baldwin, 140 Vt. 501, 438 A.2d 1135 (1981).
**Law conditional on happening of future event**
Md.—Stop Slots MD 2008 v. State Bd. of Elections, 424 Md. 163, 34 A.3d 1164 (2012).
Mo.—Akin v. Director of Revenue, 934 S.W.2d 295, 114 Ed. Law Rep. 964 (Mo. 1996).
N.H.—Opinion of the Justices, 143 N.H. 429, 725 A.2d 1082, 133 Ed. Law Rep. 172 (1999).
Wash.—Brower v. State, 137 Wash. 2d 44, 969 P.2d 42 (1998).

2 Ill.—Eisele v. Morton Park Dist., 122 Ill. App. 2d 226, 258 N.E.2d 127 (3d Dist. 1970).
La.—State v. Pearson, 975 So. 2d 646 (La. Ct. App. 5th Cir. 2007).
Or.—Hazell v. Brown, 238 Or. App. 487, 242 P.3d 743 (2010), decision aff'd, 352 Or. 455, 287 P.3d 1079 (2012).
**Specification of conditions**
Ark.—City of Cave Springs v. City of Rogers, 343 Ark. 652, 37 S.W.3d 607 (2001).

3 Ariz.—Burney v. Lee, 59 Ariz. 360, 129 P.2d 308 (1942).
Iowa—Gannett v. Cook, 245 Iowa 750, 61 N.W.2d 703 (1953).
Or.—Marr v. Fisher, 182 Or. 383, 187 P.2d 966 (1947).

4 U.S.—Hirabayashi v. U.S., 320 U.S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943).
Kan.—Giddings v. City of Pittsburg, 197 Kan. 777, 421 P.2d 181 (1966).
Neb.—State v. Padley, 195 Neb. 358, 237 N.W.2d 883 (1976).

5 Ala.—Porter Coal Co. v. Davis, 231 Ala. 359, 165 So. 93 (1935).
Minn.—Remington Arms Co. v. G. E. M. of St. Louis, Inc., 257 Minn. 562, 102 N.W.2d 528 (1960).

6 Alaska—Suber v. Alaska State Bond Committee, 414 P.2d 546 (Alaska 1966).
D.C.—Savage v. District of Columbia, 54 A.2d 562 (Mun. Ct. App. D.C. 1947).
N.C.—Williamson v. Snow, 239 N.C. 493, 80 S.E.2d 262 (1954).

7 D.C.—Savage v. District of Columbia, 54 A.2d 562 (Mun. Ct. App. D.C. 1947).

8 Cal.—Housing Authority of Los Angeles County v. Dockweiler, 14 Cal. 2d 437, 94 P.2d 794 (1939).
Ind.—Financial Aid Corp. v. Wallace, 216 Ind. 114, 23 N.E.2d 472, 125 A.L.R. 736 (1939).
Ky.—Logan v. City of Louisville, 283 Ky. 518, 142 S.W.2d 161 (1940).
Mich.—People v. Gottlieb, 337 Mich. 276, 59 N.W.2d 289 (1953).

9 Fla.—Ex parte Lewis, 101 Fla. 624, 135 So. 147 (1931).
Mass.—Howes Bros. Co. v. Massachusetts Unemployment Compensation Com'n, 296 Mass. 275, 5 N.E.2d 720 (1936).
Wash.—Royer v. Public Utility Dist. No. 1 of Benton County, 186 Wash. 142, 56 P.2d 1302 (1936).

**Adoption of constitutional amendment**

Ala.—Opinion of the Justices, 287 Ala. 326, 251 So. 2d 744 (1971).
N.M.—In re Thaxton, 1968-NMSC-014, 78 N.M. 668, 437 P.2d 129 (1968).
N.C.—Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

**Federal appropriations**

Ala.—Opinion of the Justices, 344 So. 2d 1196 (Ala. 1977).

**Recommendation of grand jury**

Ga.—Freeney v. Pape, 185 Ga. 1, 194 S.E. 515 (1937).

10 Fla.—State ex rel. Taylor v. City of Tallahassee, 130 Fla. 418, 177 So. 719 (1937).
Iowa—Lausen v. Board of Sup'rs of Harrison County, 204 Iowa 30, 214 N.W. 682 (1927).
Wash.—Royer v. Public Utility Dist. No. 1 of Benton County, 186 Wash. 142, 56 P.2d 1302 (1936).
As to adoption of statute by vote of locality affected, see §§ 331, 332.

**Electing scheme of compensation for work accident**

R.I.—Sayles v. Foley, 38 R.I. 484, 96 A. 340 (1916).

11 Fla.—State ex rel. Taylor v. City of Tallahassee, 130 Fla. 418, 177 So. 719 (1937).

12 U.S.—Old Dearborn Distributing Co. v. Seagram-Distillers Corporation, 299 U.S. 183, 57 S. Ct. 139, 81 L. Ed. 109, 106 A.L.R. 1476 (1936).
Cal.—Southern Pac. Transportation Co. v. Public Utilities Com., 18 Cal. 3d 308, 134 Cal. Rptr. 189, 556 P.2d 289 (1976).
Ky.—McGuffey v. Hall, 557 S.W.2d 401 (Ky. 1977).

13 Mo.—State ex rel. Carpenter v. City of St. Louis, 318 Mo. 870, 2 S.W.2d 713 (1928).
N.M.—Yeo v. Tweedy, 1929-NMSC-033, 34 N.M. 611, 286 P. 970 (1929).
N.D.—Enderson v. Hildenbrand, 52 N.D. 533, 204 N.W. 356 (1925).

**Limit of power**

A statute is void if it confers on petitioners not merely the power of initiative but also the power of ultimate decision in regard to the subject matter of the petition.
Kan.—State ex rel. Jackson v. School Dist. No. 2, 140 Kan. 171, 34 P.2d 102 (1934).

14 U.S.—Wallace v. Currin, 95 F.2d 856 (C.C.A. 4th Cir. 1938), decree aff'd by, 306 U.S. 1, 59 S. Ct. 379, 83 L. Ed. 441 (1939).
Ill.—Zisook v. Maryland-Drexel Neighborhood Redevelopment Corp., 3 Ill. 2d 570, 121 N.E.2d 804 (1954).
Mich.—Dukesherer Farms, Inc. v. Ball, 405 Mich. 1, 273 N.W.2d 877 (1979).

15 U.S.—State of Minn. by Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981).
Iowa—Gannett v. Cook, 245 Iowa 750, 61 N.W.2d 703 (1953).

16 Fla.—State ex rel. Taylor v. City of Tallahassee, 130 Fla. 418, 177 So. 719 (1937).
Minn.—O'Brien v. City of Saint Paul, 285 Minn. 378, 173 N.W.2d 462 (1969).
Ohio—State ex rel. Standard Oil Co. v. Combs, 129 Ohio St. 251, 2 Ohio Op. 152, 194 N.E. 875 (1935).

**Lack of objection**

U.S.—Grendel's Den, Inc. v. Goodwin, 662 F.2d 88 (1st Cir. 1981), on reh'g en banc, 662 F.2d 102 (1st Cir. 1981), judgment aff'd, 459 U.S. 116, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982).
Mass.—Arno v. Alcoholic Beverages Control Commission, 377 Mass. 83, 384 N.E.2d 1223 (1979).

**Waiver of restrictions**

U.S.—Leighton v. City of Minneapolis, 16 F. Supp. 101 (D. Minn. 1936).

  

17 U.S.—North Carolina Ass'n for Retarded Children v. State of N.C., 420 F. Supp. 451 (M.D. N.C. 1976).
Md.—Maryland Co-op. Milk Producers v. Miller, 170 Md. 81, 182 A. 432 (1936).
S.C.—Willis v. Town of Woodruff, 200 S.C. 266, 20 S.E.2d 699 (1942).
**Zoning**
S.D.—Cary v. City of Rapid City, 1997 SD 18, 559 N.W.2d 891 (S.D. 1997).
Va.—County of Fairfax v. Fleet Indus. Park Ltd. Partnership, 242 Va. 426, 410 S.E.2d 669 (1991).

18 U.S.—Leighton v. City of Minneapolis, 16 F. Supp. 101 (D. Minn. 1936).
Ala.—Opinion of the Justices, 344 So. 2d 1196 (Ala. 1977).
Mo.—State ex inf. Crain ex rel. Peebles v. Moore, 339 Mo. 492, 99 S.W.2d 17 (1936).
Tenn.—Clark v. State ex rel. Bobo, 172 Tenn. 429, 113 S.W.2d 374 (1938).

19 § 331.

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# 16 C.J.S. Constitutional Law § 331

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

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**4. Delegation of Powers**

**a. In General**

## § 331. Local option and submission to popular vote

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2445

**Generally, subject to some divergent opinion, a legislature may make the local application of a completely enacted general law subject to local approval or make the operation of a special local law dependent on approval of the voters of the territory in which the statute is to operate.**

Notwithstanding some contrary authority,[1] it is generally ruled that, in the absence of constitutional authorization, the legislature cannot submit to the voters of the entire state the question whether an act will become a law,[2] or whether an existing law will be repealed,[3] although there is authority holding that the question as to the time when an act will take effect may be so submitted.[4] However, in accordance with general principles governing conditional and contingent legislation,[5] the application and enforcement in given localities of general affirmative legislation may generally be made dependent on the will of the voters of such localities,[6] at least where the constitution specifically so authorizes.[7] Thus, the legislature may provide that whether a local law or ordinance will be operative may be submitted to general referendum amongst the local voters.[8] It has been further

  

determined that a provision in a special or local statute that it will not become operative unless approved by the electors within the territory in which the law is to operate is not an unconstitutional delegation of legislative authority.[9]

On the other hand, the rule has been announced that a statute so framed that it must derive its efficacy from popular vote constitutes an invalid delegation of legislative power,[10] and for this reason, it has been decided that, as distinguished from the submission of a general law to local option, there can be no valid submission to the voters of a particular locality of the question of the adoption of a special law applicable only to that locality.[11] In some jurisdictions, the legislature, in the absence of express constitutional authorization, may not make the local operation of general legislation contingent on popular vote except in the case of statutes dealing with matters peculiarly within local control, such as the organization of public corporations to administer local affairs and the bringing about of local improvements.[12]

In any event, the law must be complete in all its terms and provisions when it leaves the legislative branch of the government, and the option to become, or not to become, subject to its requirements and penalties is the only matter that should be submitted to the vote of the electors.[13] Also, the right of the electors of a locality to invoke the operation of a statute by popular vote must be exercised in the manner prescribed by the statute and is subject to such qualifications and limitations as are contained therein.[14] The legislature cannot constitutionally provide that the qualified voters in one governmental unit will decide whether a statute will be in force and effect elsewhere than in the territory comprising that particular governmental unit.[15]

***Sale of intoxicating liquors.***

It is generally ruled that the question of authorizing or prohibiting the sale of liquor within a given locality may be left to the determination of the voters thereof,[16] at least where a constitutional provision specifically authorizes such submission.[17]

***Laws pertaining to other particular subjects.***

Legislative acts whose operation in particular localities or subdivisions of the state may be made dependent on the approval of the electors of such localities also include statutes creating a municipal court,[18] abolishing the court of county revenues and establishing in lieu thereof a board of revenue,[19] providing for street improvements by municipalities and assessment of the cost against abutting owners,[20] permitting racing park franchise holders to decide whether a question of wagering on electronic games of skill at horse and greyhound parks should be submitted to voters in city,[21] establishing a system of protecting plants and animals from infection,[22] allowing each county in the state to hold a local option election to determine whether to prohibit Sunday hunting on privately owned land,[23] providing for the establishment and maintenance of county free libraries,[24] and authorizing the conduct of games in certain cities on Sunday.[25]



Footnotes

1 Cal.—Ex parte Beck, 162 Cal. 701, 124 P. 543 (1912).
S.D.—Wyatt v. Kundert, 375 N.W.2d 186 (S.D. 1985).
Wis.—State v. Johnson, 170 Wis. 218, 175 N.W. 589, 7 A.L.R. 1617 (1919).

2 Ala.—Opinion of the Justices, 287 Ala. 321, 251 So. 2d 739 (1971).
Ill.—People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N.E. 108, 76 A.L.R. 1044 (1931).
Md.—Board of Sup'rs of Elections for Anne Arundel County v. Attorney General, 246 Md. 417, 229 A.2d 388 (1967).
N.H.—Opinion of the Justices, 143 N.H. 429, 725 A.2d 1082, 133 Ed. Law Rep. 172 (1999).

N.Y.—Burke v. Kern, 287 N.Y. 203, 38 N.E.2d 500 (1941).
R.I.—Opinion to the Governor, 62 R.I. 316, 6 A.2d 147, 123 A.L.R. 235 (1939).
Tenn.—Clark v. State ex rel. Bobo, 172 Tenn. 429, 113 S.W.2d 374 (1938).
Delegation of power to create corporations by making creation dependent on vote of people, see § 337.

**Surrender of discretion**

The legislature may not surrender its own discretion in the enactment of general laws to qualified electors of the State or any part of state.
Miss.—State ex rel. Attorney General v. School Board of Quitman County, 181 Miss. 818, 181 So. 313 (1938).

3 La.—State v. Washburn, 177 La. 27, 147 So. 489 (1933).

4 Vt.—State v. Scampini, 77 Vt. 92, 59 A. 201 (1904).

5 § 330.

6 Ill.—Hoogasian v. Regional Transp. Authority, 58 Ill. 2d 117, 317 N.E.2d 534 (1974).
Miss.—Carter v. Harrison County Election Commission, 183 So. 2d 630 (Miss. 1966).
N.C.—Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).
N.H.—Opinion of the Justices, 143 N.H. 429, 725 A.2d 1082, 133 Ed. Law Rep. 172 (1999).
S.C.—Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999).
Vt.—Stowe Citizens for Responsible Government v. State, 169 Vt. 559, 730 A.2d 573, 135 Ed. Law Rep. 193 (1999).

**Constitutional amendment**

A constitutional amendment providing that the legislature could not enact legislation affecting Winston County without the approval of the electors of that county, was valid and not in derogation of the constitutional provision that legislative power will be vested in a legislature.
Ala.—Cagle v. Qualified Electors of Winston County, 470 So. 2d 1208 (Ala. 1985).

**County consolidation plan**

Kan.—State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan., 264 Kan. 293, 955 P.2d 1136 (1998).

**Health and general welfare**

Act relating to health and general welfare of a body politic may be left to voters of a particular district.
N.J.—Downs v. Town of Boonton, 99 N.J.L. 40, 122 A. 721 (N.J. Sup. Ct. 1923).

7 Tex.—Ex parte Farnsworth, 61 Tex. Crim. 353, 135 S.W. 535 (1911).

8 N.J.—McLaughlin v. City of Millville, 110 N.J. Super. 200, 264 A.2d 762 (Law Div. 1970).

9 Ga.—Phillips v. City of Atlanta, 210 Ga. 72, 77 S.E.2d 723 (1953).
Ill.—People ex rel. Chicago Dryer Co. v. City of Chicago, 413 Ill. 315, 109 N.E.2d 201 (1952).
Iowa—Gannett v. Cook, 245 Iowa 750, 61 N.W.2d 703 (1953).

10 Tenn.—Sandford v. Pearson, 190 Tenn. 652, 231 S.W.2d 336 (1950).

11 Tenn.—Buena Vista Special School Dist. v. Board of Election Com'rs of Carroll County, 173 Tenn. 198, 116 S.W.2d 1008 (1938).

12 Tex.—Trimmier v. Carlton, 116 Tex. 572, 296 S.W. 1070 (1927).

13 Ill.—People v. Kelly, 357 Ill. 408, 192 N.E. 372 (1934).

14 Tex.—Consolidated Common School Dist. No. 5 v. Wood, 112 S.W.2d 231 (Tex. Civ. App. Eastland 1937), dismissed.

15 Md.—Levering v. Board of Sup'rs of Elections of Baltimore City, 137 Md. 281, 112 A. 301 (1921).
N.C.—State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).
Tex.—Fritter v. West, 65 S.W.2d 414 (Tex. Civ. App. San Antonio 1933), writ refused.

16 La.—State v. Gardner, 198 La. 861, 5 So. 2d 132 (1941).
Miss.—Martin v. Board of Sup'rs of Winston County, 181 Miss. 363, 178 So. 315 (1938).
Tenn.—Clark v. State ex rel. Bobo, 172 Tenn. 429, 113 S.W.2d 374 (1938).

17 Tex.—Letcher v. State, 126 Tex. Crim. 593, 73 S.W.2d 100 (1934).

18 Ill.—Chicago Terminal Transfer R. Co. v. Greer, 223 Ill. 104, 79 N.E. 46 (1906).

19 Ala.—Opinion of the Justices, 253 Ala. 111, 43 So. 2d 3 (1949).

20 Tex.—Sullivan v. Roach-Manigan Paving Co. of Texas, 220 S.W. 444 (Tex. Civ. App. San Antonio 1920), writ dismissed, (Oct. 4, 1920).

  

21 Ark.—Gallas v. Alexander, 371 Ark. 106, 263 S.W.3d 494 (2007).

22 Fla.—Whitaker v. Parsons, 80 Fla. 352, 86 So. 247 (1920).

Va.—Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S.E. 141, 12 A.L.R. 1121 (1920).

23 W. Va.—Hartley Hill Hunt Club v. County Com'n of Ritchie County, 220 W. Va. 382, 647 S.E.2d 818 (2007).

24 N.J.—Downs v. Town of Boonton, 99 N.J.L. 40, 122 A. 721 (N.J. Sup. Ct. 1923).

25 Mass.—Anderson v. Secretary of Com., 255 Mass. 366, 151 N.E. 378 (1926).

Pa.—Young v. Fetterolf, 320 Pa. 289, 182 A. 676 (1936).

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**Constitutional Law**
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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**4. Delegation of Powers**

**a. In General**

## § 332. Local option and submission to popular vote—Matters pertaining to political subdivisions, districts, and schools

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2445

**On an affirmative vote of the inhabitants of the territory concerned, a statute may provide for the organization of a district as a municipal corporation; provide for the establishment, division, alteration, enlargement, or abolition of schools and school districts, and the control of schools; or provide for municipal aid to public improvements by the issue and donation of bonds or the subscription of corporate stock by political subdivisions.**

As a general rule, the legislature may by law authorize the submission to the inhabitants of a district of the question of the organization of such district as a municipal corporation[1] or, conversely, of the question of the surrender of a franchise to act as such a corporation.[2] The annexation of territory to an existing municipality may be made dependent on a vote of the people of such territory.[3]

  

The acceptance of a charter, or of an amendment to an existing charter,[4] or of the dissolution of a charter,[5] or of a statute providing a different form of municipal government,[6] or of a statute enlarging or extending the corporate powers[7] may likewise be submitted to the voters of a municipality. Thus, the legislature may provide by statute a commission or urban county form of government and may authorize its acceptance or rejection by popular vote in the affected localities,[8] and it may make changes in such forms of government and authorize adoption of such changes in this manner.[9]

***Establishment of towns, counties, and locations of county seats and public buildings.***

A reference to the voters of the territory involved of such questions as the subdivision or consolidation of counties or townships,[10] or changes in the boundaries thereof,[11] does not constitute a delegation of legislative power. Also, legislatures may refer to the voters of a county questions as to the location of county seats,[12] and questions as to the location and erection of public buildings.[13]

***Laws pertaining to schools.***

The legislature may provide laws as to the establishment, division, alteration, enlargement, or abolition of schools and school districts, and the control of schools, to take effect when adopted by a vote of the people of the district,[14] but it may not by private act authorize the voters of a particular district to determine the body which is to operate such district.[15] While there is authority that the legislature may provide for the submission to the people of the district affected of questions as to the levy of local taxes for school purposes,[16] a statute conditioning a tax increase in a special school district on a popular vote in that district has been struck down as an unconstitutional delegation of legislative power.[17]

***Issuance of bonds by school district.***

Authority may be given to a school district to issue bonds to construct buildings on approval thereof by voters of the district.[18]

***Laws pertaining to other particular subjects.***

On an affirmative vote of the inhabitants of the territory concerned, a statute providing for the creation of irrigation,[19] drainage,[20] or public utility[21] districts is valid, as is one providing for the creation of lighting,[22] bridge construction,[23] or highway[24] districts, or for the continuance of a road district, the operation of which has been suspended.[25] Legislative acts whose operation in particular localities or subdivisions of the state may be made dependent on the approval of the electors of such localities also include statutes abolishing justice districts[26] and establishing park districts.[27]



Footnotes

1 Fla.—Heyward v. Hall, 144 Fla. 344, 198 So. 114 (1940).
Minn.—State v. Kiewell, 86 Minn. 136, 90 N.W. 160 (1902).
Or.—In re Incorporation of Communities of Rockaway and Seaview in Tillamook County, 153 Or. 382, 55 P.2d 1107 (1936).

2 Fla.—Olds v. State, 101 Fla. 218, 133 So. 641 (1931).

3 Ala.—City of Birmingham v. Norton, 255 Ala. 262, 50 So. 2d 754 (1950).

Mich.—Hempel ex rel. Michigan Limestone & Chemical Co. v. Rogers Tp., 313 Mich. 1, 20 N.W.2d 787 (1945).

N.Y.—Long Island University v. Tappan, 202 Misc. 956, 113 N.Y.S.2d 795 (Sup 1952), judgment aff'd, 281 A.D. 771, 118 N.Y.S.2d 767 (2d Dep't 1953), judgment aff'd, 305 N.Y. 893, 114 N.E.2d 432 (1953).

4 N.C.—Cottrell v. Town of Lenoir, 173 N.C. 138, 91 S.E. 827 (1917).

Tex.—Keller v. Western Paving Co., 218 S.W. 1077 (Tex. Civ. App. San Antonio 1920), writ refused.

5 Ga.—Harrell v. Courson, 234 Ga. 350, 216 S.E.2d 105 (1975).

6 La.—City of Gretna v. Bailey, 141 La. 625, 75 So. 491 (1917).

N.Y.—Cleveland v. City of Watertown, 222 N.Y. 159, 118 N.E. 500 (1917).

7 Tex.—Riley v. Town of Trenton, 184 S.W. 344 (Tex. Civ. App. Texarkana 1916), writ refused, (Dec. 6, 1916).

8 Ark.—Stockburger v. Cruse, 191 Ark. 822, 88 S.W.2d 70 (1935).

Ind.—Sarlls v. State ex rel. Trimble, 201 Ind. 88, 166 N.E. 270, 67 A.L.R. 718 (1929).

Ky.—Holsclaw v. Stephens, 507 S.W.2d 462 (Ky. 1973) (disapproved of on other grounds by, Jacobs v. Lexington-Fayette Urban County Government, 560 S.W.2d 10 (Ky. 1977)).

Wis.—State v. Baxter, 195 Wis. 437, 219 N.W. 858 (1928).

9 Wis.—State v. Baxter, 195 Wis. 437, 219 N.W. 858 (1928).

10 Ga.—Hines v. Etheridge, 173 Ga. 870, 162 S.E. 113 (1931).

11 Ala.—Jackson v. State, 131 Ala. 21, 31 So. 380 (1902).

Cal.—Wheeler v. Herbert, 152 Cal. 224, 92 P. 353 (1907).

Me.—Fournier v. Commissioners of Aroostook County, 109 Me. 48, 82 A. 545 (1912).

**Consolidation plan**

Kan.—State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan., 264 Kan. 293, 955 P.2d 1136 (1998).

12 Ala.—State v. Crook, 126 Ala. 600, 28 So. 745 (1900).

13 Kan.—State v. Board of Com'rs of Butler County, 77 Kan. 527, 94 P. 1004 (1908).

N.C.—Black v. Commissioners of Buncombe County, 129 N.C. 121, 39 S.E. 818 (1901).

14 Ill.—People v. Deatherage, 401 Ill. 25, 81 N.E.2d 581 (1948).

Ohio—State ex rel. Taft v. Franklin County Court of Common Pleas, 81 Ohio St. 3d 480, 1998-Ohio-333, 692 N.E.2d 560, 124 Ed. Law Rep. 1042 (1998).

Wis.—State v. Auer, 197 Wis. 284, 223 N.W. 123 (1929).

**Retirement salaries plan**

Cal.—Davis v. Los Angeles County, 12 Cal. 2d 412, 84 P.2d 1034 (1938).

15 Tenn.—Buena Vista Special School Dist. v. Board of Election Com'rs of Carroll County, 173 Tenn. 198, 116 S.W.2d 1008 (1938).

16 Ga.—Coleman v. Board of Ed. of Emanuel County, 131 Ga. 643, 63 S.E. 41 (1908).

Ky.—Folks v. Barren County, 313 Ky. 515, 232 S.W.2d 1010 (1950).

17 Tenn.—Gibson County Special School Dist. v. Palmer, 691 S.W.2d 544, 25 Ed. Law Rep. 1288 (Tenn. 1985).

18 Tenn.—Kee v. Parks, 153 Tenn. 306, 283 S.W. 751 (1926).

19 Tex.—Trimmier v. Carlton, 116 Tex. 572, 296 S.W. 1070 (1927).

20 Kan.—State v. Drainage Dist. No. 1 of Lyon County, 123 Kan. 191, 254 P. 372 (1927).

21 Or.—Board of Directors of Northern Wasco County People's Utility Dist. v. Kelly, 171 Or. 691, 137 P.2d 295 (1943).

Wash.—Royer v. Public Utility Dist. No. 1 of Benton County, 186 Wash. 142, 56 P.2d 1302 (1936).

22 N.H.—Goodrich Falls Elec. Co. v. Howard, 86 N.H. 512, 171 A. 761 (1934).

23 Ark.—Fenolio v. Sebastian Bridge Dist., 133 Ark. 380, 200 S.W. 501 (1917).

24 Ark.—Capps v. Judsonia-Steprock Road Imp. Dist., 154 Ark. 46, 242 S.W. 72 (1922).

25 Ark.—Summers v. Road Imp. Dist. No. 16 of Woodruff County, 160 Ark. 371, 254 S.W. 696 (1923).

26 Fla.—Brevard County v. Harland, 102 So. 2d 137 (Fla. 1957).

27 Ill.—People v. Kelly, 357 Ill. 408, 192 N.E. 372 (1934).

Ind.—Johnson v. Board of Park Com'rs of Ft. Wayne, 202 Ind. 282, 174 N.E. 91 (1930).

  

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**Constitutional Law**
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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

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**4. Delegation of Powers**

**a. In General**

## § 333. Initiative and referendum

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2445

**As provided for, and limited by, the constitution, the people may exercise powers of direct legislation by means of initiative and referendum, subject to the constitutional restrictions imposed on the legislature. Generally, the legislature may grant voters of a municipality the right of initiative and referendum with respect to the enactment of municipal ordinances.**

The question whether an act will become a law cannot, as a general rule, be submitted to the voters of the entire state; only the question whether or not a complete law will be operative and enforceable in certain local subdivisions of the state may ordinarily be submitted to the voters of such local subdivisions.[1] Although referenda on legislation are unconstitutional, unless a constitutional provision expressly permits such a delegation of legislative power,[2] or the delegation enjoys a "sanction by immemorial usage,"[3] large powers of direct legislation may be vested in the people through the incorporation in the state constitutions of provisions for the initiative and referendum,[4] subject to the provision of the Federal Constitution guaranteeing to each state a republican form of government.[5]

  

Rather than constituting delegated legislative power,[6] the power exercised through the initiative and referendum is legislative power reserved to the people;[7] and ordinarily, the initiative and referendum are not inconsistent with a republican form of government.[8] A person who initiates or proposes a bill under this direct system of legislation is not a legislator, but his or her act is a voluntary one in the exercise of a private and political right.[9] This right may be exercised only as permitted and defined, limited, and circumscribed by the constitution and the laws passed in obedience to, and in compliance with, the constitution.[10] So, constitutional limitations and restrictions imposed on the legislature are obligatory on the people when legislating by the initiatory method.[11] Also, constitutional limitations imposed on the character of the legislation which may be initiated, proposed, or submitted to referendum must be conformed to, as for example, provisions excepting from the referendum laws necessary for the immediate preservation of the public peace, health, or safety[12] and acts calling elections, levying taxes, and appropriating money.[13] Neither referred act of legislature, nor initiated law, can recall any power or privilege granted by constitution,[14] and the constitutional rights of a minority are not subject to abrogation by such popular vote.[15]

Some provisions have been construed not to extend the power of referendum to enactments for carrying into effect provisions relating to the initiative and referendum.[16] Where the language of the provision is that the people reserve the power to adopt or reject any act, or any section or part of any act, passed by the legislature, the referendum may be invoked as to all acts which must be passed in the form of a statute but not as to acts of legislative power which may be taken by joint resolution.[17]

In the absence of constitutional provision to such effect, the legislature is not deprived of the power to amend or repeal an act which has been initiated or referred.[18]

***As to enactment of county or municipal regulations.***

There is authority that absent an inhibitory constitutional provision, the legislature, by enactment, may grant to the people of a municipality the right of initiative and referendum with respect to the promulgation of municipal ordinances and regulations.[19] On the other hand, legislative authorization for the use of the initiative and referendum in the enactment of county[20] and municipal[21] regulations has been ruled invalid.

**CUMULATIVE SUPPLEMENT**

**Cases:**

Statute prohibiting marijuana possession or use on public university and college campuses, even by an Arizona Medical Marijuana Act (AMMA) cardholder, amended AMMA's list of locations where the legislature could impose civil, criminal, or other penalties for marijuana possession or use, and therefore the constitutional restrictions of the Voter Protection Act (VPA), limiting the legislature's power to amend voter initiatives, applied; the AMMA did not list university or college campuses as prohibited locations, and the statute specifically referenced the AMMA list of locations and stated it was adding to it. Ariz. Const. art. 4, pt. 1, § 1; Ariz. Rev. Stat. Ann. §§ 15-108(A), 36-2802(B). State v. Maestas, 244 Ariz. 9, 417 P.3d 774 (2018).

**[END OF SUPPLEMENT]**



Footnotes

1 § 332.

2 N.H.—Opinion of the Justices, 143 N.H. 429, 725 A.2d 1082, 133 Ed. Law Rep. 172 (1999).
Tenn.—Gibson County Special School Dist. v. Palmer, 691 S.W.2d 544, 25 Ed. Law Rep. 1288 (Tenn. 1985).
**Allowing cash payouts for video game machine credits**
S.C.—Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999).

3 Tenn.—Gibson County Special School Dist. v. Palmer, 691 S.W.2d 544, 25 Ed. Law Rep. 1288 (Tenn. 1985).

4 N.D.—Baird v. Burke County, 53 N.D. 140, 205 N.W. 17 (1925).
Okla.—Ralls v. Wyand, 1914 OK 28, 40 Okla. 323, 138 P. 158 (1914).
S.D.—State v. Olsen, 30 S.D. 57, 137 N.W. 561 (1912).
Definition, formal requisites, and sufficiency of initiative and referendum, see C.J.S., Statutes §§ 142 to 181.
**Plenary or unlimited power**
In respect of the state constitution, the power of people in exercising initiative and referendum in enacting law is plenary or unlimited except as restrained by the constitution.
Mont.—State v. Brannon, 86 Mont. 200, 283 P. 202, 67 A.L.R. 1020 (1929).

5 Neb.—State v. Moorhead, 99 Neb. 527, 156 N.W. 1067 (1916).
N.Y.—Stanton v. Board of Sup'rs of Essex County, 191 N.Y. 428, 84 N.E. 380 (1908).
As to the constitutional guaranty to each state of a republican form of government, see C.J.S., States § 41.

6 U.S.—City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976).

7 U.S.—City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976).
Ark.—Hodges v. Dawdy, 104 Ark. 583, 149 S.W. 656 (1912).
Cal.—Associated Home Builders etc., Inc. v. City of Livermore, 18 Cal. 3d 582, 135 Cal. Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038 (1976).

8 Kan.—State v. Board of Com'rs of City of Hutchinson, 93 Kan. 405, 144 P. 241 (1914).
Okla.—Ex parte Wagner, 1908 OK 77, 1908 OK CR 16, 21 Okla. 33, 1 Okla. Crim. 148, 95 P. 435 (1908).
Or.—Kiernan v. City of Portland, 57 Or. 454, 111 P. 379 (1910).

9 Wash.—State v. Superior Court In and For Thurston County, 92 Wash. 16, 159 P. 92 (1916).

10 Wash.—State v. Superior Court In and For Thurston County, 92 Wash. 16, 159 P. 92 (1916).

11 Ariz.—Tillotson v. Frohmiller, 34 Ariz. 394, 271 P. 867 (1928).
Mont.—State v. Dixon, 59 Mont. 58, 195 P. 841 (1921) (overruled on other grounds by, Board of Regents of Higher Ed. v. Judge, 168 Mont. 433, 543 P.2d 1323 (1975)).
Okla.—Granger v. City of Tulsa, 1935 OK 801, 174 Okla. 565, 51 P.2d 567 (1935).
**No restriction**
No such limitation exists in the absence of constitutional restriction.
Ark.—Hammett v. Hodges, 104 Ark. 510, 149 S.W. 667 (1912).

12 Ark.—Hanson v. Hodges, 109 Ark. 479, 160 S.W. 392 (1913).

13 Cal.—Hopping v. City of Richmond, 170 Cal. 605, 150 P. 977 (1915).

14 Colo.—City of Ft. Collins v. Public Utilities Com'n, 69 Colo. 554, 195 P. 1099 (1921).

15 U.S.—Alkire v. Cashman, 350 F. Supp. 360, 35 Ohio Misc. 55, 64 Ohio Op. 2d 220 (S.D. Ohio 1972), aff'd, 477 F.2d 598 (6th Cir. 1973).

16 Okla.—Norris v. Cross, 1909 OK 316, 25 Okla. 287, 105 P. 1000 (1909).

17 Cal.—Hopping v. City of Richmond, 170 Cal. 605, 150 P. 977 (1915).

18 § 341.

19 Cal.—In re Pfahler, 150 Cal. 71, 88 P. 270 (1906).
Neb.—Enos v. Hanff, 98 Neb. 245, 152 N.W. 397 (1915).
Or.—State ex rel. Bradford v. Portland Ry., Light & Power Co., 56 Or. 32, 107 P. 958 (1910).
**Establishment of municipal legislative body**
Constitutional requirement that a city charter will provide a legislative body is not violated by conferring the power of initiative and referendum on electors after establishing such body.
Minn.—State v. City of Duluth, 134 Minn. 355, 159 N.W. 792 (1916).
Mo.—Pitman v. Drabelle, 267 Mo. 78, 183 S.W. 1055 (1916).

20 Wis.—Marshall v. Dane County Board of Sup'rs, 236 Wis. 57, 294 N.W. 496 (1940).

21 Tex.—Ex parte Farnsworth, 61 Tex. Crim. 353, 135 S.W. 535 (1911).

  

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**b. Delegation to Federal or State Government; Delegation to Private Person or Entity**

## § 334. Delegation by states to federal government

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2400, 2401, 2433, 2436, 2443, 2444

**A state legislature may not delegate its sovereign power to the federal government, but statutes adopting existing statutes, rules, or regulations of Congress by reference are constitutional.**

The state legislatures may not delegate their sovereign powers to the federal government.[1] Accordingly, legislative power cannot be delegated by a state legislature to the United States Congress,[2] or to a federal agency.[3] However, statutes which do not violate this proscription are not invalid on such grounds.[4]

A statute is valid which adopts existing statutes, rules, or regulations of Congress,[5] or regulations or determinations of federal administrative agencies,[6] provided no attempt is made to adopt future laws, rules, or regulations of the federal government.[7] However, an attempt to make future regulations part of the state law by reference is generally considered to be unconstitutional,[8] particularly where the criminal laws with regard to controlled substances are involved.[9]

  

Footnotes

1 Ark.—W.E. Tucker Oil Co., Inc. v. Portland Bank, 285 Ark. 453, 688 S.W.2d 293 (1985).
Mich.—Taylor v. Smithkline Beecham Corp., 468 Mich. 1, 658 N.W.2d 127 (2003).
Minn.—Minnesota Energy and Economic Development Authority v. Printy, 351 N.W.2d 319 (Minn. 1984).
Okla.—Thomas v. Henry, 2011 OK 53, 260 P.3d 1251 (Okla. 2011).

2 Colo.—People v. Tenorio, 197 Colo. 137, 590 P.2d 952 (1979).
Kan.—State v. Dumler, 221 Kan. 386, 559 P.2d 798 (1977).
La.—State v. Rodriguez, 379 So. 2d 1084 (La. 1980).

3 La.—State v. Rodriguez, 379 So. 2d 1084 (La. 1980).
Ohio—State v. Gill, 63 Ohio St. 3d 53, 584 N.E.2d 1200 (1992).
Tex.—Calvert v. Capital Southwest Corp., 441 S.W.2d 247 (Tex. Civ. App. Austin 1969), writ refused n.r.e., (Oct. 1, 1969).

4 Cal.—Palermo v. Stockton Theatres, 32 Cal. 2d 53, 195 P.2d 1 (1948).
N.Y.—Watkinson v. Hotel Pennsylvania, 195 A.D. 624, 187 N.Y.S. 278 (3d Dep't 1921), aff'd, 231 N.Y. 562, 132 N.E. 889 (1921).
Or.—State ex rel. Public Welfare Commission v. Malheur County Court, 185 Or. 392, 203 P.2d 305 (1949).
**Controlled substance**
Statute providing that if any substance is designated as a controlled substance under federal law and notice thereof is given to a division of health, the division will similarly control the substance unless it objects to the designation did not result in a delegation of power to control substances within the state to the federal government since a substance could be controlled under the statute only if the division of health decided not to object and issued a rule controlling the substance.
Mo.—State v. Thompson, 627 S.W.2d 298 (Mo. 1982).

5 U.S.—Alaska SS Co. v. Mullaney, 12 Alaska 594, 180 F.2d 805 (9th Cir. 1950).
Fla.—Riggins v. State, 369 So. 2d 948 (Fla. 1979).
Mich.—Taylor v. Smithkline Beecham Corp., 468 Mich. 1, 658 N.W.2d 127 (2003).
Md.—Leatherwood v. State, 49 Md. App. 683, 435 A.2d 477 (1981).

6 Ariz.—State v. Williams, 119 Ariz. 595, 583 P.2d 251 (1978).
Fla.—State v. Rodriquez, 365 So. 2d 157 (Fla. 1978).
Ill.—McHenry State Bank v. Harris, 89 Ill. 2d 542, 61 Ill. Dec. 547, 434 N.E.2d 1144 (1982).
**Controlled substances; depressant or stimulant drugs**
Fla.—Cilento v. State, 377 So. 2d 663 (Fla. 1979).
Ga.—Johnston v. State, 227 Ga. 387, 181 S.E.2d 42 (1971).
Md.—Mason v. State, 12 Md. App. 655, 280 A.2d 753 (1971).
**Federal standards**
W. Va.—State ex rel. Callaghan v. West Va. Civil Service Commission, 166 W. Va. 117, 273 S.E.2d 72 (1980).

7 Fla.—Department of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976).
Minn.—Wallace v. Commissioner of Taxation, 289 Minn. 220, 184 N.W.2d 588 (1971).
N.D.—State v. Julson, 202 N.W.2d 145 (N.D. 1972).
**Law in effect**
Where a statute generally incorporates a federal law or regulation, Florida courts interpret the statute as incorporating only the federal law in effect on the date of adoption of the Florida statute.
Fla.—Abbott Laboratories v. Mylan Pharmaceuticals, Inc., 15 So. 3d 642 (Fla. 1st DCA 2009).

8 Fla.—Adoue v. State, 408 So. 2d 567 (Fla. 1981).
Mich.—City of Warren v. State Const. Code Commission, 66 Mich. App. 493, 239 N.W.2d 640 (1976).
Wash.—State v. Dougall, 89 Wash. 2d 118, 570 P.2d 135 (1977).

9 Fla.—State v. Welch, 279 So. 2d 11 (Fla. 1973).
Wash.—State v. Dougall, 89 Wash. 2d 118, 570 P.2d 135 (1977).
W. Va.—State v. Grinstead, 157 W. Va. 1001, 206 S.E.2d 912 (1974).

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

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**b. Delegation to Federal or State Government; Delegation to Private Person or Entity**

## § 335. Delegation by states to other states

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2400, 2401, 2434, 2436

**Generally, one state may not delegate legislative authority to any branch of another state's government.**

Generally, one state may not delegate legislative authority to any branch of another state's government.[1] However, statutes adopting laws or regulations of other states, effective at the time of adoption, are valid[2] although an attempted adoption of future laws, rules, or regulations of other states is unconstitutional as an unlawful delegation of the legislative power.[3] In accordance with these rules, statutes authorizing the use of out-of-state convictions to establish a defendant as a second felony offender do not improperly delegate the legislative power to legislatures of other jurisdictions.[4]

Although there is contrary authority,[5] it has been ruled that a state statute which makes the amount of taxes, fines, or penalties to be paid by foreign corporations doing business within the state dependent on the amount of such charges imposed by the state of origin on foreign corporations is not an unconstitutional delegation of legislative power[6] since the statute does not

  

delegate power to the foreign legislature to fix the amount of the charges but merely imposes taxes, the amount of which is made contingent on an extraneous fact.[7]



Footnotes

1 Colo.—People v. Tenorio, 197 Colo. 137, 590 P.2d 952 (1979).

2 W. Va.—State v. Grinstead, 157 W. Va. 1001, 206 S.E.2d 912 (1974).

3 W. Va.—State v. Grinstead, 157 W. Va. 1001, 206 S.E.2d 912 (1974).

4 Colo—People v. Tenorio, 197 Colo. 137, 590 P.2d 952 (1979).
N.Y.—People v. Parker, 41 N.Y.2d 21, 390 N.Y.S.2d 837, 359 N.E.2d 348 (1976).

5 Ala.—Phenix City v. Alabama Power Co., 239 Ala. 547, 195 So. 894 (1940).

6 N.C.—Hagood v. Doughton, 195 N.C. 811, 143 S.E. 841 (1928).
Pa.—Commonwealth v. Lichter, 1 Pa. D. & C. 709, 1922 WL 3501 (Quar. Sess. 1922).

7 Pa.—Commonwealth v. Lichter, 1 Pa. D. & C. 709, 1922 WL 3501 (Quar. Sess. 1922).

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## § 336. Delegation by Congress to states

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2434 to 2436, 2444

**Congress may adopt as federal law the law of a state, and such an act is not an unconstitutional delegation of congressional authority.**

Congress may adopt as federal law the law of a state without there being an unconstitutional delegation of congressional authority,[1] particularly where the law is being made applicable to a federal enclave.[2] Furthermore, Congress may delegate fact-finding authority to state legislatures.[3] However, Congress can neither delegate its own legislative powers to the state legislatures nor adopt prospectively such laws as the states may thereafter pass on any particular subject.[4]

Acts of Congress under which liquors imported in original packages are made subject to the laws of the state into which they are carried do not confer on the state power to legislate on that subject but merely declare when the property in question will become subject to state laws, and are not, therefore, a delegation of federal legislative power.[5] Variations in the extent and

  

incidence of federal taxes, affected by differences in state laws, do not infringe the constitutional prohibitions against delegation of the taxing power.[6]

Congress may delegate to the state legislatures the power to make supplementary regulations concerning the location of mining claims on public lands,[7] and the recognition by a federal bankruptcy statute of the laws of the several states with regard to such matters as exemptions, dower, and priority of payments does not constitute a delegation of congressional power as to render the act void.[8]



Footnotes

1 U.S.—U.S. v. Palmer, 465 F.2d 697 (6th Cir. 1972); U.S. v. Smaldone, 485 F.2d 1333 (10th Cir. 1973).
**Extortionate extension of credit**
U.S.—U.S. v. Curcio, 310 F. Supp. 351 (D. Conn. 1970).

2 U.S.—U.S. v. Sharpnack, 355 U.S. 286, 78 S. Ct. 291, 2 L. Ed. 2d 282 (1958); Wallach v. Lieberman, 366 F.2d 254, 2 A.L.R. Fed. 969 (2d Cir. 1966).

3 U.S.—Carroll v. Finch, 326 F. Supp. 891 (D. Alaska 1971).

4 Ky.—Moore v. Allen, 30 Ky. 651, 7 J.J. Marsh. 651, 1832 WL 2258 (1832).
**Statutes not unconstitutional**
U.S.—Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 66 S. Ct. 1142, 90 L. Ed. 1342, 164 A.L.R. 476 (1946); Wolfe v. Phillips, 172 F.2d 481 (10th Cir. 1949); State of S.D. v. Adams, 506 F. Supp. 50 (D.S.D. 1980), judgment aff'd, 635 F.2d 698 (8th Cir. 1980).

5 U.S.—James Clark Distilling Co. v. Western Maryland R. Co., 242 U.S. 311, 37 S. Ct. 180, 61 L. Ed. 326 (1917).
S.C.—Atkinson v. Southern Exp. Co., 94 S.C. 444, 78 S.E. 516 (1913).

6 U.S.—Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 66 S. Ct. 1142, 90 L. Ed. 1342, 164 A.L.R. 476 (1946).

7 U.S.—Butte City Water Co. v. Baker, 196 U.S. 119, 25 S. Ct. 211, 49 L. Ed. 409 (1905).

8 U.S.—Hanover Nat. Bank v. Moyses, 186 U.S. 181, 22 S. Ct. 857, 46 L. Ed. 1113 (1902); Matter of Sullivan, 680 F.2d 1131 (7th Cir. 1982); In re Lausch, 16 B.R. 162 (M.D. Fla. 1981).

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

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**4. Delegation of Powers**

**b. Delegation to Federal or State Government; Delegation to Private Person or Entity**

## § 337. Delegation by legislature to private persons, associations, or corporations

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2442

**Generally, the legislature may not delegate legislative powers to private persons, associations, or corporations.**

Inasmuch as the power to legislate is by nature nondelegable, ordinarily, it may not be delegated to a private person or persons,[1] such as associations or organizations,[2] or private corporations,[3] especially when the delegation serves private interests[4] or raises the possibility that a conflict of interests will affect the decisions taken.[5]

Under the provisions of some constitutions, the legislature cannot delegate to a private corporation any power to perform any municipal functions.[6]

**CUMULATIVE SUPPLEMENT**

  

**Cases:**

International cancer research agency was not a private corporation, and thus statute delegating authority to agency for identification of carcinogens was not invalid under portion of State Constitution which forbade initiative statutes from identifying private corporations to perform any function, where agency was intergovernmental body under international law, and was overseen and generally managed by United States and foreign government agents. Cal. Const. art. 2, § 12; Cal. Lab. Code § 6382(b)(1). Monsanto Company v. Office of Environmental Health Hazard Assessment, 22 Cal. App. 5th 534, 231 Cal. Rptr. 3d 537 (5th Dist. 2018), review filed, (May 29, 2018).

**[END OF SUPPLEMENT]**



Footnotes

1 U.S.—Helvering v. Lerner Stores Corporation, 314 U.S. 463, 62 S. Ct. 341, 86 L. Ed. 482 (1941).
Kan.—State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan., 264 Kan. 293, 955 P.2d 1136 (1998).
Mich.—Taylor v. Smithkline Beecham Corp., 468 Mich. 1, 658 N.W.2d 127 (2003).
Tex.—Proctor v. Andrews, 972 S.W.2d 729 (Tex. 1998).
**Fair trade laws**
(1) Validity sustained.
Ariz.—Skaggs Drug Center, Inc. v. U. S. Time Corp., 101 Ariz. 392, 420 P.2d 177 (1966).
Cal.—Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 55 Cal. Rptr. 23, 420 P.2d 735 (1966).
Del.—Warner Stores Co. v. E. R. Squibb & Sons, Inc., 43 Del. Ch. 129, 219 A.2d 579 (1966).
(2) Validity denied.
Mass.—Corning Glass Works v. Ann & Hope, Inc. of Danvers, 363 Mass. 409, 294 N.E.2d 354 (1973).
N.C.—Bulova Watch Co., Inc. v. Brand Distributors of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).
S.D.—House of Seagram, Inc. v. Assam Drug Co., 85 S.D. 27, 176 N.W.2d 491 (1970).
**Performance of municipal functions**
Cal.—County of Riverside v. Superior Court, 30 Cal. 4th 278, 132 Cal. Rptr. 2d 713, 66 P.3d 718 (2003).
**Regulation of prices**
There is a strong policy against a government's delegating power to regulate prices to a private body.
Pa.—Pennsylvania Coal Min. Ass'n v. Insurance Dept., 471 Pa. 437, 370 A.2d 685 (1977).
**Formulation of potential regulation**
While private entities can formulate and suggest potential regulation, the doctrine of unlawful delegation requires the legislature or a regulatory agency to exercise the final say over whether any particular regulation becomes law.
Cal.—Light v. State Water Resources Control Board, 226 Cal. App. 4th 1463, 173 Cal. Rptr. 3d 200 (1st Dist. 2014), as modified on denial of reh'g, (July 11, 2014) and review denied, (Oct. 1, 2014).

2 Kan.—Robinson v. Kansas State High School Activities Ass'n, Inc., 260 Kan. 136, 917 P.2d 836, 110 Ed. Law Rep. 435 (1996).
Ill.—Totten v. State Bd. of Elections, 79 Ill. 2d 288, 38 Ill. Dec. 137, 403 N.E.2d 225 (1980).
Pa.—Wingrove v. W.C.A.B. (Allegheny Energy), 83 A.3d 270 (Pa. Commw. Ct. 2014), appeal denied, 94 A.3d 1011 (Pa. 2014).
Vt.—State v. Curley-Egan, 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 (2006).
Minn.—West St. Paul Federation of Teachers v. Independent School Dist. No. 197, West St. Paul, 713 N.W.2d 366, 208 Ed. Law Rep. 893 (Minn. Ct. App. 2006).
**Subjection to noise regulations improper**
Ill.—People v. Pollution Control Bd., 83 Ill. App. 3d 802, 38 Ill. Dec. 928, 404 N.E.2d 352 (1st Dist. 1980).
**Discipline of professionals not unconstitutional delegation**

Cal.—Hogan v. State Bar, 36 Cal. 2d 807, 228 P.2d 554 (1951).
Fla.—Bryan v. State Bd. of Medical Examiners, 398 So. 2d 1354 (Fla. 1981).
Md.—Commission on Medical Discipline v. Stillman, 291 Md. 390, 435 A.2d 747 (1981).

**Veterans Assistance Commission not private body or group**

Ill.—Makowicz v. Macon County, 78 Ill. 2d 308, 35 Ill. Dec. 774, 399 N.E.2d 1302 (1980).

3 Ky.—Baughn v. Gorrell & Riley, 311 Ky. 537, 224 S.W.2d 436 (1949).
N.Y.—Fink v. Cole, 302 N.Y. 216, 97 N.E.2d 873 (1951).
S.D.—City of Chamberlain v. R.E. Lien, Inc., 521 N.W.2d 130 (S.D. 1994).

4 Colo.—Colorado Energy Advocacy Office v. Public Service Co. of Colorado, 704 P.2d 298 (Colo. 1985).

5 Tex.—FM Properties Operating Co. v. City of Austin, 22 S.W.3d 868 (Tex. 2000).

6 Cal.—County of Riverside v. Superior Court, 30 Cal. 4th 278, 132 Cal. Rptr. 2d 713, 66 P.3d 718 (2003).
Mont.—State ex rel. Normile v. Cooney, 100 Mont. 391, 47 P.2d 637 (1935).
Pa.—Lighton v. Township of Abington, 336 Pa. 345, 9 A.2d 609 (1939).

**Delegation to special public or private commissions**

S.D.—Specht v. City of Sioux Falls, 526 N.W.2d 727 (S.D. 1995).

**Statutes held not unconstitutional**

Pa.—Evans v. West Norriton Tp. Municipal Authority, 370 Pa. 150, 87 A.2d 474 (1952).
Utah—Wagner v. Salt Lake City, 29 Utah 2d 42, 504 P.2d 1007 (1972).

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**b. Delegation to Federal or State Government; Delegation to Private Person or Entity**

## § 338. Delegation by legislature to private persons, associations, or corporations—When permissible

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2442

**Delegations of power to private entities are permissible if the legislative purpose is discernible, there is protection against the arbitrary exercise of power and if proper standards, guidelines, and procedural safeguards exist.**

Delegations of power to private entities are permissible if the legislative purpose is discernable, there is protection against the arbitrary exercise of power,[1] and if proper standards, guidelines, and procedural safeguards exist.[2]

To determine whether the private delegation of legislative power is constitutional, courts consider several factors, and in assessing these factors, the courts are mindful that delegations to private entities are subject to more stringent requirements and less judicial deference than public delegations. Those factors include considerations of whether the private delegate's actions are subject to meaningful review by state agency, whether the persons affected by the private delegate's actions are adequately represented in the decisionmaking process, whether the private delegate's power is limited to making rules, whether the private

  

delegate has pecuniary or other personal interest that may conflict with its public function, and whether the private delegate is empowered to define criminal acts or impose criminal sanctions.[3]

Another test is whether the particular delegation is reasonable under the circumstances, considering the purpose and aim of the statute.[4] In order to meet the reasonableness test, a statute delegating power to private persons must satisfy both of the underlying concerns of the nondelegation doctrine in that the legislature itself must have decided fundamental policy questions relevant to the legislative scheme,[5] and such power may not validly be delegated where its exercise is not accompanied by adequate legislative standards or safeguards against arbitrary or self-motivated action.[6]

The legislature may employ private persons, associations, or private corporations in a public,[7] administrative capacity to carry the law into effect,[8] or to determine facts on which the application or enforcement of the law is to depend,[9] providing the statute establishes an independent standard for the guidance of those who are to administer the law.[10]

***Determination of public or private status.***

To determine whether a group is public or private in evaluating the constitutionality of a delegation of legislative power, the court must look to the group's character, relations, and functions.[11] An important factor in determining whether a delegation of legislative powers has been made to a public officer rather than a private person is whether or not the incumbent of the office is free to exercise powers vested in him or her free of any supervision or control by others other than to conform to the provisions of law creating the office.[12] Where the occupant of a particular office is vested by law with a portion of the State's sovereignty and is authorized to exercise functions either of an executive, legislative, or judicial character, the primary indispensable element for establishment of his or her character as a public officer is present.[13]



Footnotes

1 Tex.—Bracey v. City of Killeen, 417 S.W.3d 94 (Tex. App. Austin 2013).

2 Mass.—Construction Industries of Massachusetts v. Commissioner of Labor and Industries, 406 Mass. 162, 546 N.E.2d 367 (1989).
N.J.—Humane Soc. of U. S., New Jersey Branch, Inc. v. New Jersey State Fish and Game Council, 70 N.J. 565, 362 A.2d 20 (1976).
Wash.—Entertainment Industry Coalition v. Tacoma-Pierce County Health Dept., 153 Wash. 2d 657, 105 P.3d 985 (2005).
**Adoption of organization's code, guidelines, instructions, or standards**
Ky.—Pegs Branch Mining v. Coleman, 2003 WL 1193090 (Ky. 2003).
Me.—York Mut. Ins. Co. of Maine v. Superintendent of Ins., 485 A.2d 239 (Me. 1984).
Mich.—City of Warren v. State Const. Code Commission, 66 Mich. App. 493, 239 N.W.2d 640 (1976).
N.M.—Madrid v. St. Joseph Hosp., 1996-NMSC-064, 122 N.M. 524, 928 P.2d 250 (1996).
Or.—Meyer v. Lord, 37 Or. App. 59, 586 P.2d 367 (1978).
S.C.—Eastern Federal Corp. v. Wasson, 281 S.C. 450, 316 S.E.2d 373 (1984).

3 Tex.—City of Santa Fe v. Boudreaux, 256 S.W.3d 819 (Tex. App. Houston 14th Dist. 2008).

4 N.J.—Humane Soc. of U. S., New Jersey Branch, Inc. v. New Jersey State Fish and Game Council, 70 N.J. 565, 362 A.2d 20 (1976).
**Reference to prevailing wages**
Ariz.—Industrial Commission v. C & D Pipeline, Inc., 125 Ariz. 64, 607 P.2d 383 (Ct. App. Div. 1 1979).
N.J.—Male v. Ernest Renda Contracting Co., Inc., 64 N.J. 199, 314 A.2d 361 (1974).

5 R.I.—Jennings v. Exeter-West Greenwich Regional School Dist. Committee, 116 R.I. 90, 352 A.2d 634 (1976).

6 R.I.—Jennings v. Exeter-West Greenwich Regional School Dist. Committee, 116 R.I. 90, 352 A.2d 634 (1976).
Tex.—Proctor v. Andrews, 972 S.W.2d 729 (Tex. 1998).

7 Mass.—DiLoreto v. Fireman's Fund Ins. Co., 383 Mass. 243, 418 N.E.2d 612 (1981).
R.I.—Opinion to the Governor, 112 R.I. 151, 308 A.2d 809 (1973).
Wyo.—Witzenburger v. State ex rel. Wyoming Community Development Authority, 575 P.2d 1100 (Wyo. 1978).

8 Mass.—M. H. Gordon & Son, Inc. v. Alcoholic Beverage Control Commission, 371 Mass. 584, 358 N.E.2d 778 (1976).
Minn.—State v. Forge, 262 N.W.2d 341 (Minn. 1977).
Pa.—Pennsylvania State Ass'n of Tp. Sup'rs v. Com., Ins. Dept., 50 Pa. Commw. 204, 412 A.2d 675 (1980).

**Automatic fuel adjustment clause**
Ind.—L. S. Ayres & Co. v. Indianapolis Power & Light Co., 169 Ind. App. 652, 351 N.E.2d 814 (1976).

**Decisions of securities association subject to administrative review**
U.S.—First Jersey Securities, Inc. v. Bergen, 605 F.2d 690 (3d Cir. 1979).

**Fair trade regulation**
It is not an unconstitutional delegation of power to private persons for a motor vehicle board to be required to delay motor vehicle dealership franchise establishments and relocations only when protested by existing franchisees who have unfettered discretion whether or not to protest.
U.S.—New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 439 U.S. 96, 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978).

**Licensing**
U.S.—Simon v. Cameron, 337 F. Supp. 1380 (C.D. Cal. 1970).
Cal.—Packer v. Board of Behavioral Science Examiners, 52 Cal. App. 3d 190, 125 Cal. Rptr. 96 (2d Dist. 1975).

9 U.S.—Carroll v. Finch, 326 F. Supp. 891 (D. Alaska 1971).
N.C.—Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).
W. Va.—State ex rel. West Virginia Housing Development Fund v. Copenhaver, 153 W. Va. 636, 171 S.E.2d 545 (1969).

**Consensus standards**
U.S.—Noblecraft Industries, Inc. v. Secretary of Labor, 614 F.2d 199 (9th Cir. 1980).

**Necessity for eminent domain**
Ala.—Alabama Power Co. v. Hamilton, 342 So. 2d 8 (Ala. 1977).

**Reformation requisite to restoration of license**
N.C.—Matter of Garrison, 44 N.C. App. 158, 260 S.E.2d 445 (1979).

10 U.S.—Simon v. Cameron, 337 F. Supp. 1380 (C.D. Cal. 1970).
Conn.—Wilson v. Connecticut Product Development Corp., 167 Conn. 111, 355 A.2d 72 (1974).
Wis.—State ex rel. Warren v. Nusbaum, 59 Wis. 2d 391, 208 N.W.2d 780 (1973).

**Examination of statute in light of objectives**
N.J.—Department of Health v. Owens-Corning Fiberglas Corp., 100 N.J. Super. 366, 242 A.2d 21 (App. Div. 1968), judgment aff'd, 53 N.J. 248, 250 A.2d 11 (1969).

**National electrical code sufficient standard**
N.J.—Independent Electricians & Elec. Contractors' Ass'n v. New Jersey Bd. of Examiners of Elec. Contractors, 54 N.J. 466, 256 A.2d 33 (1969).

**Surcharge on insurance rates**
Mass.—DiLoreto v. Fireman's Fund Ins. Co., 383 Mass. 243, 418 N.E.2d 612 (1981).

11 Mich.—Dearborn Fire Fighters Union Local No. 412, IAFF v. City of Dearborn, 42 Mich. App. 51, 201 N.W.2d 650 (1972), judgment aff'd, 394 Mich. 229, 231 N.W.2d 226 (1975).

12 R.I.—City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969).

13 R.I.—City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969).

**End of Document**

# 16 C.J.S. Constitutional Law § 339

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**4. Delegation of Powers**

**b. Delegation to Federal or State Government; Delegation to Private Person or Entity**

## § 339. Delegation by legislature to private persons, associations, or corporations—Powers delegable

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2442

**The power of the legislature to delegate to private persons or organizations the power of appointment to offices within the control of the legislature has been both affirmed and denied while a delegation of authority to arbitrate disputes between public entities and their employees has been ruled as not an unconstitutional delegation of power to private persons.**

The power of the legislature to delegate to private persons or organizations the power of appointment to offices within the control of the legislature has been both affirmed[1] and denied.[2]

***Power to arbitrate disputes of a public nature.***

A delegation of authority to arbitrate disputes between public entities and their employees, which renders the panel a public body, is not an unconstitutional delegation of power to private persons[3] and, notwithstanding the public or private nature of the

tribunal, where there are adequate safeguards against arbitrary action.[4] However, the constitutional objection may arise where the award of an arbitration panel regarding the appropriation of public funds or the levying of taxes would be final and binding.[5]

***Power to create or define offenses.***

The legislature may not delegate to private persons, associations, or corporations its power to create or define offenses,[6] and thus, a statute which makes an act a misdemeanor or a tort, at the option of the complaining party, is void.[7] Furthermore, a statute which has the effect of delegating to a private person the punishment to be assessed for a crime is subject to constitutional objection.[8] A criminal statute which adequately defines a crime in terms of the conduct and mental state of the actor, and does not make criminal liability dependent on the discretionary act of a third party subsequent to the commission of the proscribed acts is not a delegation of power to third persons.[9]

***Delegation of powers to the people.***

A constitutional provision that the legislative power will be vested in a senate and assembly prohibits the legislature from converting the government into a pure democracy, or rendering the enactment of a law dependent on its acceptance by the voters of the state[10] except in accordance with initiative and referendum provisions of the constitutions.[11] Also, it does not forbid the enactment of laws delegating to the people of local subdivisions of the state the decision of questions concerning them alone.[12] or making the operation of certain laws within such subdivisions contingent on a vote of the people thereof.[13] Of course, the legislature may not delegate to the people the power to enact a law which the legislature itself is forbidden by the constitution to enact.[14]

**CUMULATIVE SUPPLEMENT**

**Cases:**

It is not the job of the Court of Appeals to make a pronouncement on a statute's wisdom, need, or propriety; the Court's responsibility, simply and supremely, is to decide cases agreeably to the Constitution and laws of the United States. Wollschlaeger v. Governor of Florida, 797 F.3d 859 (11th Cir. 2015).

**[END OF SUPPLEMENT]**



Footnotes

1 Ind.—Overshiner v. State, 156 Ind. 187, 59 N.E. 468 (1901).
R.I.—Allen v. State Bd. of Veterinarians, 72 R.I. 372, 52 A.2d 131 (1947).
S.C.—Benjamin v. Housing Authority of Darlington County, 198 S.C. 79, 15 S.E.2d 737 (1941).
**Nominations by private bodies constitutional**
Miss.—Clark v. State ex rel. Mississippi State Medical Ass'n, 381 So. 2d 1046 (Miss. 1980).
S.C.—Hartzell v. State Bd. of Examiners in Psychology, 274 S.C. 502, 265 S.E.2d 265 (1980).

2 Iowa—Gamel v. Veterans Memorial Auditorium Commission, 272 N.W.2d 472 (Iowa 1978).
Pa.—Com. ex rel. Kane v. McKechnie, 467 Pa. 430, 358 A.2d 419 (1976).
S.C.—Garris v. Governing Bd. of South Carolina Reinsurance Facility, 333 S.C. 432, 511 S.E.2d 48 (1998).
**Limitation of eligibility to members of association**
S.C.—Toussaint v. State Bd. of Medical Examiners, 285 S.C. 266, 329 S.E.2d 433 (1985).

**Appointment based on nominations**

Ga.—Rogers v. Medical Ass'n of Georgia, 244 Ga. 151, 259 S.E.2d 85 (1979).

**Transfer of authority to political party**

Ill.—People ex rel. Rudman v. Rini, 64 Ill. 2d 321, 1 Ill. Dec. 4, 356 N.E.2d 4 (1976).

3 Mich.—Dearborn Fire Fighters Union Local No. 412, IAFF v. City of Dearborn, 42 Mich. App. 51, 201 N.W.2d 650 (1972), judgment aff'd, 394 Mich. 229, 231 N.W.2d 226 (1975).

Mo.—Roberts v. City of St. Joseph, 637 S.W.2d 98 (Mo. Ct. App. W.D. 1982).

Or.—Medford Firefighters Ass'n, Local No. 1431, IAFF v. City of Medford, 40 Or. App. 519, 595 P.2d 1268 (1979).

**Policy with respect to working conditions**

Utah—Salt Lake City v. International Ass'n of Firefighters, Locals 1645, 593, 1654 and 2064, 563 P.2d 786 (Utah 1977).

**Selection of arbitrators**

Tex.—Proctor v. Andrews, 972 S.W.2d 729 (Tex. 1998).

4 Me.—Superintending School Committee of City of Bangor v. Bangor Ed. Ass'n, 433 A.2d 383 (Me. 1981).

Mass.—Town of Arlington v. Board of Conciliation and Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976).

5 Pa.—Franklin County Prison Bd. v. Pennsylvania Labor Relations Bd., 491 Pa. 50, 417 A.2d 1138 (1980).

6 U.S.—Seele v. U.S., 133 F.2d 1015 (C.C.A. 8th Cir. 1943).

Ky.—Bloemer v. Turner, 281 Ky. 832, 137 S.W.2d 387 (1939).

Pa.—Labuck v. Mill Creek Coal Co., 292 Pa. 284, 141 A. 35 (1928).

**Controlled substances statute upheld**

Pa.—Com., Dept. of Health v. DeMarco, 53 Pa. Commw. 1, 416 A.2d 623 (1980), decree aff'd by, 501 Pa. 69, 459 A.2d 756 (1983).

7 Ga.—Fortune v. Braswell, 139 Ga. 609, 77 S.E. 818 (1913).

8 Neb.—State v. Goodseal, 186 Neb. 359, 183 N.W.2d 258 (1971).

9 Colo.—People v. Mason, 642 P.2d 8 (Colo. 1982).

10 Ill.—Parks v. Libbey-Owens-Ford Glass Co., 360 Ill. 130, 195 N.E. 616 (1935).

La.—State ex rel. Porterie v. Smith, 184 La. 263, 166 So. 72 (1935).

Md.—Ahlgren v. Cromwell, 179 Md. 243, 17 A.2d 134 (1941).

11 § 333.

12 § 366.

13 §§ 331, 332.

14 Colo.—Schwartz v. People, 46 Colo. 239, 47 Colo. 483, 104 P. 92 (1909).

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# 16 C.J.S. Constitutional Law § 340

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**4. Delegation of Powers**

**c. Delegation to Executive**

**(1) In General**

## § 340. Delegation to the executive branch

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2405, 2406, 2410

**The legislature may not, unless the constitution expressly provides otherwise, delegate legislative functions to executive officers or bodies although, having established a policy, standard, or rule for their guidance, it may leave to them matters of administrative detail.**

"Legislative power," i.e., authority to pass rules of law for the government and regulation of people or property,[1] may not be delegated by the legislative to the executive department or to any executive or administrative officer, board, or commission[2] except as such delegation may be expressly authorized by a constitutional provision.[3]

While executive agencies cannot be empowered by the legislature to exercise powers which the legislature itself does not possess,[4] once a certain policy or rule has been prescribed by statute, matters of detail in carrying out the executive duty of giving effect to the legislation may be left to executive or administrative officers, boards, or commissions.[5] In other words, even though

  

the legislature cannot delegate its legislative functions, it may confer upon administrative agencies power to apply general provisions of law to particular circumstances.[6] This rule is applicable although the performance of such duty may require the exercise of discretion[7] within defined limits,[8] or of other powers, of a legislative,[9] quasi-legislative,[10] or quasi-judicial[11] nature.

A statute which in effect reposes an absolute, unregulated, and undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of legislative powers.[12] And an unconstitutional delegation of legislative power occurs when a legislative body confers upon an administrative agency unrestricted authority to make fundamental policy decisions.[13]



Footnotes

1 Ill.—Reif v. Barrett, 355 Ill. 104, 188 N.E. 889 (1933) (overruled in part on other grounds by, Thorpe v. Mahin, 43 Ill. 2d 36, 250 N.E.2d 633 (1969)).

2 U.S.—Garcia v. U.S., 439 U.S. 1079, 99 S. Ct. 860, 59 L. Ed. 2d 49 (1979).
Conn.—State v. Lubus, 216 Conn. 402, 581 A.2d 1045 (1990).
Ill.—East St. Louis Federation of Teachers, Local 1220, American Federation of Teachers, AFL-CIO v. East St. Louis School Dist. No. 189 Financial Oversight Panel, 178 Ill. 2d 399, 227 Ill. Dec. 568, 687 N.E.2d 1050, 123 Ed. Law Rep. 293 (1997).
Neb.—Schumacher v. Johanns, 272 Neb. 346, 722 N.W.2d 37 (2006).
Ohio—Redman v. Ohio Dept. of Indus. Relations, 75 Ohio St. 3d 399, 1996-Ohio-196, 662 N.E.2d 352 (1996).
Tenn.—Gallaher v. Elam, 104 S.W.3d 455 (Tenn. 2003).
Wash.—Hi-Starr, Inc. v. Washington State Liquor Control Bd., 106 Wash. 2d 455, 722 P.2d 808 (1986).

3 N.Y.—Burke v. Kern, 287 N.Y. 203, 38 N.E.2d 500 (1941).
N.C.—Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971).
Okla.—Patterson v. Stanolind Oil & Gas Co., 1938 OK 138, 182 Okla. 155, 77 P.2d 83 (1938).

4 U.S.—U.S. v. National Garment Co., 10 F. Supp. 104 (E.D. Mo. 1935).
Cal.—People ex rel. Benwell v. Foutz, 27 Cal. 2d 1, 162 P.2d 1 (1945).
Fla.—Thomas v. State ex rel. Cobb, 58 So. 2d 173, 34 A.L.R.2d 140 (Fla. 1952).
N.C.—State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968).

5 U.S.—Garcia v. U.S., 439 U.S. 1079, 99 S. Ct. 860, 59 L. Ed. 2d 49 (1979).
Mass.—Opinion of the Justices to Governor, 384 Mass. 840, 429 N.E.2d 1019 (1981).
N.M.—Montoya v. O'Toole, 1980-NMSC-045, 94 N.M. 303, 610 P.2d 190 (1980).
As to power to enact rules and regulations, see § 342.
**Convenience**
In the execution of its public policy, a legislature can call on its boards to do that which it could not conveniently do for itself.
S.D.—Boever v. South Dakota Bd. of Accountancy, 1997 SD 34, 561 N.W.2d 309 (S.D. 1997).
**Formulation of guidelines**
Under the separation of powers doctrine, the legislature may delegate the job of formulating guidelines to an agency that is likely better equipped to undertake the task.
Ariz.—Cook v. State, 230 Ariz. 185, 281 P.3d 1053 (Ct. App. Div. 1 2012).

6 Vt.—Vincent v. Vermont State Retirement Bd., 148 Vt. 531, 536 A.2d 925 (1987).

7 U.S.—American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 67 S. Ct. 133, 91 L. Ed. 103 (1946).
Ala.—Ex parte Baldwin County Planning and Zoning Com'n, 68 So. 3d 133 (Ala. 2010).
N.M.—Cobb v. State Canvassing Board, 2006-NMSC-034, 140 N.M. 77, 140 P.3d 498 (2006).
W. Va.—State ex rel. Marockie v. Wagoner, 191 W. Va. 458, 446 S.E.2d 680, 93 Ed. Law Rep. 391 (1994).
As to necessity for guiding standards, see § 341.
**Method and manner of enforcing law**

Neb.—Bartlett v. State Real Estate Commission, 188 Neb. 828, 199 N.W.2d 709 (1972).

**Choice between well-defined alternatives permitted**

Mich.—Penn School Dist. No. 7 v. Board of Ed. of Lewis-Cass Intermediate School Dist. of Cass County, 14 Mich. App. 109, 165 N.W.2d 464 (1968).

8 Iowa—State v. Rivera, 260 Iowa 320, 149 N.W.2d 127 (1967).

S.C.—Gilstrap v. South Carolina Budget and Control Bd., 310 S.C. 210, 423 S.E.2d 101 (1992).

Wash.—Barry & Barry, Inc. v. State Dept. of Motor Vehicles, 81 Wash. 2d 155, 500 P.2d 540 (1972).

9 Mass.—Opinion of the Justices, 328 Mass. 674, 105 N.E.2d 565 (1952).

Okla.—Rush v. Brown, 1940 OK 194, 187 Okla. 97, 101 P.2d 262 (1940).

Wis.—Olson v. State Conservation Commission, 235 Wis. 473, 293 N.W. 262 (1940).

10 U.S.—U.S. v. Pray, 452 F. Supp. 788 (M.D. Pa. 1978).

Mass.—Opinion of the Justices to the House of Representatives, 368 Mass. 831, 333 N.E.2d 388 (1975).

S.D.—Krsnak v. South Dakota Dept. of Environment and Natural Resources, 2012 SD 89, 824 N.W.2d 429 (S.D. 2012).

R.I.—In re Request for Advisory Opinion from House of Representatives (Coastal Resources Management Council), 961 A.2d 930 (R.I. 2008).

11 Iowa—City of Clinton v. Loeffelholz, 448 N.W.2d 308 (Iowa 1989).

**Right of appeal essential**

Minn.—Larson v. Commissioner of Revenue, 581 N.W.2d 25 (Minn. 1998).

12 Ark.—Hobbs v. Jones, 2012 Ark. 293, 412 S.W.3d 844 (2012).

13 Cal.—Golightly v. Molina, 229 Cal. App. 4th 1501, 178 Cal. Rptr. 3d 168 (2d Dist. 2014), review denied, (Jan. 14, 2015).

**End of Document**

# 16 C.J.S. Constitutional Law § 341

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

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**B. Legislative Powers and Delegation Thereof**

**4. Delegation of Powers**

**c. Delegation to Executive**

**(1) In General**

## § 341. Necessity and sufficiency of standards; procedural safeguards

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2407

**A delegation of authority to the executive department or to an executive or administrative officer in connection with the administration of statutes must be circumscribed by a policy, standard, or rule for their guidance.**

In order for a delegation of authority by the legislature to the executive department or to any executive or administrative officer, board, or commission to be constitutional, the legislature must ordinarily prescribe a clear[1] and intelligible[2] policy, standard, or rule for their guidance and must not vest them with an arbitrary or uncontrolled discretion with regard thereto[3] or with respect to the matters[4] or persons[5] to which the statutes are to be applied. So, the legislature cannot vest in executive officers or bodies an uncontrolled power to vary, change, or suspend a statute.[6]

The legislature is not required to legislate for the guidance of executive agencies further than is practicable,[7] and, if the circumstances require, may express the policies or standards in merely general terms,[8] so long as they can be reasonably inferred

  

from the statutory scheme as a whole.[9] Indeed, under some authorities, if it is impossible or impracticable to lay down criteria or standards without destroying the flexibility necessary to enable executive officers to effectuate the legislative will, it may even confer discretion without such restrictions.[10]

The adequacy of the standards designed to control the delegation of legislative power has been described as depending on the nature or extent of the delegated power,[11] on the subject matter being regulated,[12] and on the purpose of the delegating statute.[13] In any event, the statutory standards must be adequate to guide[14] and restrain[15] the agency in the exercise of the authority which has been delegated to it. Moreover, they must be capable of being reasonably understood[16] and provide an adequate basis for judicial review.[17]

***Procedural safeguards.***

Under some authorities, the legislature may enjoin on executive bodies a certain course of procedure,[18] which furnishes adequate safeguards against administrative abuse.[19] The presence of procedural safeguards may compensate for the absence of precise substantive guidelines or standards,[20] especially where it would not be feasible for the legislature to supply precise standards[21] without frustrating the purposes of the legislation.[22]

Nevertheless, while procedural safeguards furnish protection against an arbitrary use of properly delegated authority, they cannot validate an unconstitutional delegation of power to an executive officer,[23] and some authorities have found that the establishment of procedural safeguards, in lieu of the specification of statutory standards or guides is not sufficient for constitutional purposes.[24]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Although the legislature may not delegate legislative power, it may, in some instances, assign the authority and discretion to execute or administer a law, subject to two fundamental limitations: first, the General Assembly must make the basic policy choices, and, second, the legislation must include adequate standards which will guide and restrain the exercise of the delegated administrative functions. Pa. Const. art. 2, § 1. Germantown Cab Company v. Philadelphia Parking Authority, 206 A.3d 1030 (Pa. 2019).

**[END OF SUPPLEMENT]**



Footnotes

1 Fla.—Southern Alliance for Clean Energy v. Graham, 113 So. 3d 742 (Fla. 2013).
Neb.—Davio v. Nebraska Dept. of Health and Human Services, 280 Neb. 263, 786 N.W.2d 655 (2010).
S.D.—Boever v. South Dakota Bd. of Accountancy, 1997 SD 34, 561 N.W.2d 309 (S.D. 1997).

2 Ill.—Balmoral Racing Club, Inc. v. Illinois Racing Bd., 151 Ill. 2d 367, 177 Ill. Dec. 419, 603 N.E.2d 489 (1992).
Mo.—Roe v. Replogle, 408 S.W.3d 759 (Mo. 2013).

3 U.S.—Yakus v. U. S., 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).
La.—State v. Barthelemy, 545 So. 2d 531 (La. 1989).

Pa.—Pennsylvania Builders Ass'n v. Department of Labor and Industry, 4 A.3d 215 (Pa. Commw. Ct. 2010).
S.C.—Hampton v. Haley, 403 S.C. 395, 743 S.E.2d 258 (2013).

**Broad discretion**

Delegation by the legislature of broad discretionary powers to an administrative body, accompanied by fitting standards for their exercise, is not of itself unconstitutional.

W. Va.—State ex rel. Marockie v. Wagoner, 191 W. Va. 458, 446 S.E.2d 680, 93 Ed. Law Rep. 391 (1994).

4 Ill.—Stofer v. Motor Vehicle Cas. Co., 68 Ill. 2d 361, 12 Ill. Dec. 168, 369 N.E.2d 875 (1977).
Iowa—State v. Berch, 222 N.W.2d 741 (Iowa 1974).
Mich.—Westervelt v. Natural Resources Commission, 402 Mich. 412, 263 N.W.2d 564 (1978).

5 Ill.—City of Rockford v. Hey, 366 Ill. 526, 9 N.E.2d 317 (1937).
Minn.—Lee v. Delmont, 228 Minn. 101, 36 N.W.2d 530 (1949).
Neb.—School Dist. No. 39 of Washington County v. Decker, 159 Neb. 693, 68 N.W.2d 354 (1955).

6 Cal.—American Distilling Co. v. State Board of Equalization, 55 Cal. App. 2d 799, 131 P.2d 609 (3d Dist. 1942).
Mass.—Opinion of the Justices, 315 Mass. 761, 52 N.E.2d 974, 150 A.L.R. 1482 (1944).
Okla.—Casualty Reciprocal Exchange v. Sutfin, 1945 OK 302, 196 Okla. 567, 166 P.2d 434 (1945).

7 U.S.—Garcia v. U.S., 439 U.S. 1079, 99 S. Ct. 860, 59 L. Ed. 2d 49 (1979).
Ala.—Ex parte Baldwin County Planning and Zoning Com'n, 68 So. 3d 133 (Ala. 2010).
N.Y.—McKinney v. Commissioner of New York State Dept. of Health, 15 Misc. 3d 743, 836 N.Y.S.2d 794 (Sup 2007), order aff'd, 41 A.D.3d 252, 840 N.Y.S.2d 6 (1st Dep't 2007).

**Varying degree of preciseness**

Preciseness of statutory standards will vary with both the complexity of the area at which the legislation is directed and the susceptibility to change of the area in question.

Del.—Atlantis I Condominium Ass'n v. Bryson, 403 A.2d 711 (Del. 1979).

8 U.S.—Carlson v. Landon, 342 U.S. 524, 72 S. Ct. 525, 96 L. Ed. 547 (1952).
Kan.—State ex rel. Morrison v. Sebelius, 285 Kan. 875, 179 P.3d 366 (2008).
Wash.—Brown v. Vail, 169 Wash. 2d 318, 237 P.3d 263 (2010).

9 Me.—Lewis v. State Dept. of Human Services, 433 A.2d 743 (Me. 1981).
Mich.—Dukesherer Farms, Inc. v. Ball, 405 Mich. 1, 273 N.W.2d 877 (1979).
N.J.—Sheeran v. Nationwide Mut. Ins. Co., Inc., 80 N.J. 548, 404 A.2d 625 (1979).

10 U.S.—U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 70 S. Ct. 309, 94 L. Ed. 317 (1950).
Me.—Lewis v. State Dept. of Human Services, 433 A.2d 743 (Me. 1981).
N.Y.—Kigin v. State Workers' Compensation Bd., 109 A.D.3d 299, 970 N.Y.S.2d 111 (3d Dep't 2013), leave to appeal granted, 22 N.Y.3d 854, 977 N.Y.S.2d 183, 999 N.E.2d 548 (2013) and aff'd, 24 N.Y.3d 459, 999 N.Y.S.2d 800, 24 N.E.3d 1064 (2014).

**Selection of hearing officer**

U.S.—Rite Aid Corp. v. Board of Pharmacy of State of N. J., 421 F. Supp. 1161 (D.N.J. 1976).

11 Cal.—Clean Air Constituency v. California State Air Resources Bd., 11 Cal. 3d 801, 114 Cal. Rptr. 577, 523 P.2d 617 (1974).
Kan.—State ex rel. Schneider v. Bennett, 222 Kan. 11, 222 Kan. 12, 564 P.2d 1281 (1977).
Me.—City of Biddeford by Board of Ed. v. Biddeford Teachers Ass'n, 304 A.2d 387, 68 A.L.R.3d 833 (Me. 1973).

**Sliding-scale approach, depending on scope of power delegated**

Alaska—Usibelli Coal Mine, Inc. v. State, Dept. of Natural Resources, 921 P.2d 1134 (Alaska 1996).

12 U.S.—Garcia v. U.S., 439 U.S. 1079, 99 S. Ct. 860, 59 L. Ed. 2d 49 (1979).
Mich.—Dukesherer Farms, Inc. v. Ball, 405 Mich. 1, 273 N.W.2d 877 (1979).
N.J.—Atlantic City Elec. Co. v. Bardin, 145 N.J. Super. 438, 368 A.2d 366 (App. Div. 1976).

13 U.S.—Ybarra v. Nevada Bd. of State Prison Com'rs, 520 F. Supp. 1000 (D. Nev. 1981).
Cal.—Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001 (1976).
Pa.—Com. v. Cherney, 454 Pa. 285, 312 A.2d 38 (1973).

14 U.S.—U.S. v. Natividad-Garcia, 560 F. Supp. 2d 561 (W.D. Tex. 2008).
N.J.—Kochman v. Keansburg Bd. of Ed., 124 N.J. Super. 203, 305 A.2d 807 (Ch. Div. 1973).
S.D.—Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559 (S.D. 1981).
W. Va.—State ex rel. State Farm Mut. Auto. Ins. Co. v. Marks, 230 W. Va. 517, 741 S.E.2d 75 (2012).

  

15 Kan.—State ex rel. Schneider v. Bennett, 222 Kan. 11, 222 Kan. 12, 564 P.2d 1281 (1977).
Pa.—Pennsylvania Builders Ass'n v. Department of Labor and Industry, 4 A.3d 215 (Pa. Commw. Ct. 2010).
Wash.—State ex rel. Schillberg v. Cascade Dist. Court, 94 Wash. 2d 772, 621 P.2d 115 (1980).

16 Ill.—Polyvend, Inc. v. Puckorius, 77 Ill. 2d 287, 32 Ill. Dec. 872, 395 N.E.2d 1376, 7 A.L.R.4th 1185 (1979).
N.M.—City of Albuquerque v. Jones, 1975-NMSC-025, 87 N.M. 486, 535 P.2d 1337 (1975).
Va.—Elizabeth River Crossings OpCo, LLC v. Meeks, 286 Va. 286, 749 S.E.2d 176 (2013).

17 U.S.—Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Connally, 337 F. Supp. 737 (D.D.C. 1971).
Ky.—TECO Mechanical Contractor, Inc. v. Com., 366 S.W.3d 386 (Ky. 2012), as corrected, (June 27, 2012).
N.Y.—164th Bronx Parking, LLC v. City of New York, 20 Misc. 3d 796, 862 N.Y.S.2d 248 (Sup 2008).

**Necessity for judicial review**

Provision for judicial review of the use of power delegated by the legislature is needed to ensure that authority delegated is used in accordance with the standards and policy adopted by the general court.

Mass.—Opinion of the Justices to the House of Representatives, 393 Mass. 1209, 471 N.E.2d 1266 (1984).

18 Conn.—Mitchell v. King, 169 Conn. 140, 363 A.2d 68 (1975).
Pa.—Holgate Bros. Co. v. Bashore, 331 Pa. 255, 200 A. 672, 117 A.L.R. 639 (1938).

19 Cal.—People v. Wright, 30 Cal. 3d 705, 180 Cal. Rptr. 196, 639 P.2d 267 (1982).
R.I.—Milardo v. Coastal Resources Management Council of Rhode Island, 434 A.2d 266 (R.I. 1981).
Wash.—State v. Ermert, 94 Wash. 2d 839, 621 P.2d 121 (1980).

**Sufficiency related to purpose of delegation**

Iowa—Board of Sup'rs of Linn County v. Department of Revenue, 263 N.W.2d 227 (Iowa 1978).

20 Iowa—Board of Sup'rs of Linn County v. Department of Revenue, 263 N.W.2d 227 (Iowa 1978).
Mich.—Westervelt v. Natural Resources Commission, 402 Mich. 412, 263 N.W.2d 564 (1978).
Wash.—Yakima County Clean Air Authority v. Glascam Builders, Inc., 85 Wash. 2d 255, 534 P.2d 33 (1975).

21 Me.—Superintending School Committee of City of Bangor v. Bangor Ed. Ass'n, 433 A.2d 383 (Me. 1981).

22 Del.—Atlantis I Condominium Ass'n v. Bryson, 403 A.2d 711 (Del. 1979).

23 U.S.—Metropolitan Co-op Milk Producers Bargaining Agency v. Rock Royal Co-op, 308 U.S. 631, 60 S. Ct. 67, 84 L. Ed. 526 (1939).

24 Mont.—Matter of Authority to Conduct Sav. and Loan Activities in State of Mont. by Gate City Sav. and Loan Ass'n of Fargo, North Dakota, 182 Mont. 361, 597 P.2d 84 (1979).

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# 16 C.J.S. Constitutional Law § 342

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**Constitutional Law**
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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**4. Delegation of Powers**

**c. Delegation to Executive**

**(1) In General**

## § 342. Rules and regulations

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2408

**Although the power to promulgate rules and regulations of a purely legislative character may not be delegated to executive officers, boards, or commissions, they may be authorized, pursuant to a sufficiently definite policy, standard, or rule, to make rules, regulations, and orders relating to the administration or enforcement of a law.**

Generally, a legislative delegation of power to an administrative agency permitting the agency to declare what the law is violates the separation of powers doctrine.[1] Thus, executive officers, boards or commissions may not be authorized by the legislature to promulgate rules and regulations of a strictly and exclusively legislative character.[2] The legislature may not vest executive officers or bodies with uncontrolled discretion in making rules and regulations and must establish sufficient standards for their guidance.[3] However, having established a sufficiently definite policy, standard, or rule, the legislature may authorize an administrative officer or body to make rules, regulations, or orders relating to the administration or enforcement of the law[4] and the implementation of statutory policy,[5] and give to such rules and regulations binding force[6] and effect of law.[7]

  

In any event, if wide power in an administrative body is imperative, the rule requiring definite standards and rules of guidance will be somewhat relaxed,[8] but adequate procedural safeguards must be provided in regard to the procedure for the promulgation of the rules and for the testing of their constitutionality.[9] The legislature may not authorize administrative officers to make regulations in conflict with or varying the provisions of a statute,[10] but it may delegate the authority to determine whether and where a statutory regulatory plan should go into effect or to delay the effective date of a statutory provision.[11]

It has been said that great latitude is granted to the legislature to delegate certain functions to the administrative branch of government[12] and that public officials will be assumed to exercise their express and implied powers fairly, honestly, and reasonably.[13]

***Overriding legislation.***

If the legislature concludes that an administrative regulation exceeds the agency's delegated authority or is contrary to public policy, it may adopt legislation which overrides such regulation.[14]

***Inspection.***

The legislature may authorize executive officers, appointed pursuant to a delegated authority, to make such rules and regulations as may be reasonably adapted to securing an efficient inspection and the enforcement of the law.[15] However, a rule or regulation made by such an officer which is not confined to methods of procedure and to the discharge of administrative duties imposed by the statute, but which is an attempted exercise of legislative power, is void.[16]



Footnotes

1 Fla.—Florida Gas Transmission Co. v. Public Service Com'n, 635 So. 2d 941 (Fla. 1994).

2 U.S.—Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935); Reid v. Memphis Pub. Co., 521 F.2d 512 (6th Cir. 1975).
Pa.—Ruch v. Wilhelm, 352 Pa. 586, 43 A.2d 894 (1945).
N.C.—Kinston Tobacco Bd. of Trade v. Liggett & Myers Tobacco Co., 235 N.C. 737, 71 S.E.2d 21 (1952).
**No delegation of fundamental policy-making responsibility**
Mass.—Opinion of the Justices to the Senate, 422 Mass. 1201, 660 N.E.2d 652 (1996).
N.Y.—Medical Society of State v. Serio, 100 N.Y.2d 854, 768 N.Y.S.2d 423, 800 N.E.2d 728 (2003).

3 U.S.—Sperry v. State of Fla. ex rel. Florida Bar, 373 U.S. 379, 83 S. Ct. 1322, 10 L. Ed. 2d 428 (1963).
N.H.—Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981).
W. Va.—State ex rel. Barker v. Manchin, 167 W. Va. 155, 279 S.E.2d 622 (1981).

4 U.S.—State ex rel. Dyer v. Sims, 341 U.S. 22, 71 S. Ct. 557, 95 L. Ed. 713, 62 Ohio L. Abs. 584 (1951); U.S. v. Womack, 654 F.2d 1034, 8 Fed. R. Evid. Serv. 1528 (5th Cir. 1981).
Tenn.—Boyce v. Tennessee Peace Officer Standards and Training Com'n, 354 S.W.3d 737 (Tenn. Ct. App. 2011).
W. Va.—Hornbeck v. Caplinger, 227 W. Va. 611, 712 S.E.2d 779 (2011).
**Expertise**
The legislature delegates rulemaking authority to state agencies because they usually have expertise in a particular area for which they are charged with oversight.
Fla.—Whiley v. Scott, 79 So. 3d 702 (Fla. 2011).
**Filling in details of legislative purpose**

Kan.—State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan., 264 Kan. 293, 955 P.2d 1136 (1998).

N.Y.—Dorst v. Pataki, 90 N.Y.2d 696, 665 N.Y.S.2d 65, 687 N.E.2d 1348 (1997).

**Need for administrative flexibility**

Fla.—Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004).

Kan.—State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan., 264 Kan. 293, 955 P.2d 1136 (1998).

**Retention of regulations**

U.S.—U.S. v. Goldfield Deep Mines Co. of Nevada, 644 F.2d 1307 (9th Cir. 1981).

5 Neb.—Robotham v. State, 241 Neb. 379, 488 N.W.2d 533 (1992).

**Implementation rather than determination of policy**

Tenn.—Bean v. McWherter, 953 S.W.2d 197 (Tenn. 1997).

6 U.S.—Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935).

Neb.—School Dist. No. 39 of Washington County v. Decker, 159 Neb. 693, 68 N.W.2d 354 (1955).

W. Va.—State ex rel. Barker v. Manchin, 167 W. Va. 155, 279 S.E.2d 622 (1981).

7 U.S.—Trenton Chemical Co. v. U.S., 201 F.2d 776 (6th Cir. 1953).

N.J.—Inganamort v. Borough of Fort Lee, 120 N.J. Super. 286, 293 A.2d 720 (Law Div. 1972), judgment aff'd, 62 N.J. 521, 303 A.2d 298 (1973).

W. Va.—State v. Bunner, 126 W. Va. 280, 27 S.E.2d 823 (1943).

8 Ariz.—Dennis v. Jordan, 71 Ariz. 430, 229 P.2d 692 (1951).

Ohio—Coady v. Leonard, 132 Ohio St. 329, 8 Ohio Op. 81, 7 N.E.2d 649 (1937).

Tex.—Oxford v. Hill, 558 S.W.2d 557 (Tex. Civ. App. Austin 1977), writ refused, (Mar. 15, 1978).

**Agency possessing independent power.**

Ala.—Monroe v. Harco, Inc., 762 So. 2d 828 (Ala. 2000).

9 Wash.—Matter of Powell, 92 Wash. 2d 882, 602 P.2d 711 (1979).

10 Cal.—Blatz Brewing Co. v. Collins, 69 Cal. App. 2d 639, 160 P.2d 37 (1st Dist. 1945).

Me.—Larson v. New England Tel. & Tel. Co., 141 Me. 326, 44 A.2d 1 (1945).

N.C.—North Carolina Utilities Commission v. Atlantic Coast Line R. Co., 224 N.C. 283, 29 S.E.2d 912 (1944).

11 Cal.—Salmon Trollers Marketing Assn. v. Fullerton, 124 Cal. App. 3d 291, 177 Cal. Rptr. 362 (1st Dist. 1981).

12 N.Y.—Ford v. New York State Racing and Wagering Bd., 24 N.Y.3d 488, 999 N.Y.S.2d 826, 24 N.E.3d 1090 (2014).

13 Kan.—State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan., 265 Kan. 779, 962 P.2d 543 (1998).

14 N.J.—Matter of Adoption of Regulations Governing State Health Plan, N.J.A.C. 8:100, 135 N.J. 24, 637 A.2d 1246 (1994).

15 Fla.—Gillett v. Florida University of Dermatology, 144 Fla. 236, 197 So. 852 (1940).

S.D.—State v. Struble, 19 S.D. 646, 104 N.W. 465 (1905).

W. Va.—Blue v. Smith, 69 W. Va. 761, 72 S.E. 1038 (1911).

16 Fla.—Gillett v. Florida University of Dermatology, 144 Fla. 236, 197 So. 852 (1940).

S.D.—St. Charles State Bank v. Wingfield, 36 S.D. 493, 155 N.W. 776 (1915).

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

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**c. Delegation to Executive**

**(1) In General**

## § 343. Determination of facts

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2409

**The power to determine certain facts or conditions, or the happening of contingencies, on which the operation of a statute depends, may be delegated to executive officers or boards.**

The legislature may delegate to executive officers or bodies the power to determine certain facts or conditions,[1] or the happening of contingencies,[2] on which the operation of a statute is, by its terms, made to depend. This rule is, however, subject to the requirement that the legislature prescribe sufficient standards, policies, guidelines, or limitations on their authority.[3] Similarly, the legislature may authorize administrative agencies to determine facts on which the enforcement of constitutional rights may depend.[4]

In order that they may determine facts or resolve factual disputes,[5] executive officers or bodies may be authorized to conduct investigations;[6] hold hearings;[7] and require the attendance of witnesses[8] and the production of books, records, and papers,[9]

  

as well as otherwise requiring the furnishing of information,[10] as by discovery procedures which are available to courts.[11] However, the scope of the investigation authorized by a legislature may not be subject to the unbridled discretion of the executive officer.[12]



Footnotes

1 U.S.—Garcia v. U.S., 439 U.S. 1079, 99 S. Ct. 860, 59 L. Ed. 2d 49 (1979).
Cal.—Coastside Fishing Club v. California Resources Agency, 158 Cal. App. 4th 1183, 71 Cal. Rptr. 3d 87 (1st Dist. 2008).
Mich.—Herrick Dist. Library v. Library of Michigan, 293 Mich. App. 571, 810 N.W.2d 110 (2011).
Nev.—Sheriff, Clark County v. Luqman, 101 Nev. 149, 697 P.2d 107 (1985).
Pa—In re Independent School Dist., 17 A.3d 977, 266 Ed. Law Rep. 833 (Pa. Commw. Ct. 2011).
Wash.—Diversified Inv. Partnership v. Department of Social and Health Services, 113 Wash. 2d 19, 775 P.2d 947 (1989).

2 U.S.—O'Neal v. U.S., 140 F.2d 908, 151 A.L.R. 1474 (C.C.A. 6th Cir. 1944).
Ark.—Venhaus v. State ex rel. Lofton, 285 Ark. 23, 684 S.W.2d 252 (1985).
Kan.—City of Pittsburg v. Robb, 143 Kan. 1, 53 P.2d 203 (1936).

3 U.S.—Yakus v. U. S., 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).
Colo.—People v. Lepik, 629 P.2d 1080 (Colo. 1981).
Mich.—Consumers Power Co. v. Public Service Com'n, 460 Mich. 148, 596 N.W.2d 126 (1999).
N.D.—Syverson, Rath and Mehrer, P.C. v. Peterson, 495 N.W.2d 79 (N.D. 1993).
Wash.—Washington Water Power Co. v. Washington State Human Rights Commission, 91 Wash. 2d 62, 586 P.2d 1149 (1978).

4 N.J.—In re Larsen, 17 N.J. Super. 564, 86 A.2d 430 (App. Div. 1952).
Okla.—In re Initiative Petition No. 4, for Repeal of Charter of City of Cushing, 1933 OK 398, 165 Okla. 8, 23 P.2d 677 (1933).
Or.—Multnomah County v. Luihn, 180 Or. 528, 178 P.2d 159 (1947).

5 N.H.—Hynes v. Hale, 146 N.H. 533, 776 A.2d 722 (2001).

6 Okla.—Protest of Downing, 1933 OK 387, 164 Okla. 181, 23 P.2d 173 (1933).
**Attorney general**
N.Y.—Gardner v. Lefkowitz, 97 Misc. 2d 806, 412 N.Y.S.2d 740 (Sup 1978).
**Governor**
Fla.—Thompson v. State, 342 So. 2d 52 (Fla. 1976).
N.Y.—Application of Carey, 92 Misc. 2d 316, 402 N.Y.S.2d 100 (Sup 1977), order aff'd, 68 A.D.2d 220, 416 N.Y.S.2d 904 (4th Dep't 1979).
**Necessity for broad discretion**
N.C.—In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

7 Wis.—Rust v. State Bd. of Dental Examiners of Wisconsin, 216 Wis. 127, 256 N.W. 919 (1934).

8 U.S.—McMann v. Engel, 16 F. Supp. 446 (S.D. N.Y. 1936), aff'd, 87 F.2d 377, 109 A.L.R. 1445 (C.C.A. 2d Cir. 1937).
S.D.—In re Adams, 42 S.D. 592, 176 N.W. 508 (1920).

9 U.S.—Ritholz v. Indiana State Board of Registration and Examination in Optometry, 45 F. Supp. 423 (N.D. Ind. 1937); McMann v. Engel, 16 F. Supp. 446 (S.D. N.Y. 1936), aff'd, 87 F.2d 377, 109 A.L.R. 1445 (C.C.A. 2d Cir. 1937).

10 Or.—State v. Terwilliger, 141 Or. 372, 16 P.2d 651 (1932).

11 Fla.—State Dept. of Highway Safety and Motor Vehicles v. State Career Service Commission, 322 So. 2d 64 (Fla. 1st DCA 1975).

12 N.Y.—Sussman v. New York State Organized Crime Task Force, 48 A.D.2d 154, 368 N.Y.S.2d 588 (3d Dep't 1975), order aff'd, 39 N.Y.2d 227, 383 N.Y.S.2d 276, 347 N.E.2d 638 (1976).

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**(2) Particular Applications of Rules**

## § 344. Overview; application of rule on delegation of authority to executive officers

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2410, 2411

**The general rules regarding delegation of authority to executive officers and bodies has been applied to various particular matters, including public financial affairs, properties, contracts, claims, and taxation.**

The general rules regarding the delegation of authority to executive officers and bodies by the legislature have been applied to various particular matters, including public financial affairs, properties, contracts, and claims;[1] the administration of public power and of public power projects;[2] the acquisition of property for public use;[3] the regulation of activities on government property;[4] and the management and disposition of public lands.[5]

Further applications relate to various aspects of educational affairs,[6] the regulation of imports[7] and customs duties,[8] and taxation.[9]

  

Footnotes

1 U.S.—Lichter v. U.S., 334 U.S. 742, 68 S. Ct. 1294, 92 L. Ed. 1694 (1948).
Cal.—Kizziah v. Department of Transportation, 121 Cal. App. 3d 11, 175 Cal. Rptr. 112 (1st Dist. 1981).
Fla.—State v. Housing Finance Authority of Polk County, 376 So. 2d 1158 (Fla. 1979).
**Printing work**
U.S.—American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla. 1972), judgment aff'd, 409 U.S. 904, 93 S. Ct. 230, 34 L. Ed. 2d 168 (1972).
**Revision of state laws**
Ga.—Harrison Co. v. Code Revision Commission, 244 Ga. 325, 260 S.E.2d 30 (1979).

2 U.S.—Nantahala Power & Light Co. v. Federal Power Commission, 384 F.2d 200 (4th Cir. 1967); Yuma Mesa Irr. and Drainage Dist. v. Udall, 253 F. Supp. 909 (D. D.C. 1965).
Fla.—Gainesville-Alachua County Regional Elec., Water and Sewer Utilities Bd. v. Clay Elec. Co-op., Inc., 340 So. 2d 1159 (Fla. 1976).
La.—Louisiana Power & Light Co. v. Louisiana Public Service Com'n, 609 So. 2d 797 (La. 1992).
Neb.—Application of Nebraska Public Power Dist., 191 Neb. 556, 216 N.W.2d 722 (1974).

3 U.S.—U.S. v. 67.59 Acres of Land, More or Less, in Huntingdon County, Com. of Pa., 415 F. Supp. 544 (M.D. Pa. 1976).
N.H.—Gazzola v. Clements, 120 N.H. 25, 411 A.2d 147 (1980).
Tex.—Coates v. Windham, 613 S.W.2d 572 (Tex. Civ. App. Austin 1981).

4 U.S.—U.S. v. Crowthers, 456 F.2d 1074 (4th Cir. 1972); U.S. v. Adams, 502 F. Supp. 21 (S.D. Fla. 1980).
**Atomic energy installation**
U.S.—U.S. v. Best, 476 F. Supp. 34 (D. Colo. 1979).
**Exercise of First Amendment rights**
U.S.—Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968).
**Occupation of public property**
N.M.—State v. Jaramillo, 83 N.M. 800, 1972-NMCA-071, 498 P.2d 687 (Ct. App. 1972).

5 U.S.—Mountain States Tel. & Tel. Co. v. U. S., 204 Ct. Cl. 521, 499 F.2d 611 (1974).
Idaho—State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976).
N.J.—Meadowlands Regional Development Agency v. State, 112 N.J. Super. 89, 270 A.2d 418 (Ch. Div. 1970), judgment aff'd, 63 N.J. 35, 304 A.2d 545 (1973).

6 Fla.—Cornwell v. University of Florida, 307 So. 2d 203 (Fla. 1st DCA 1975).
Ill.—Cronin v. Lindberg, 66 Ill. 2d 47, 4 Ill. Dec. 424, 360 N.E.2d 360 (1976).
N.C.—Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971).
**Admission requirements for professional school**
Wash.—McDonald v. Hogness, 92 Wash. 2d 431, 598 P.2d 707 (1979).
**Bus transportation to nonpublic schools**
R.I.—Members of Jamestown School Committee v. Schmidt, 122 R.I. 185, 405 A.2d 16 (1979).
**College management changes**
Okla.—Board of Regents for Oklahoma Agr. and Mechanical Colleges for and on Behalf of Murray State College of Agriculture and Applied Science v. Oklahoma State Regents for Higher Ed., 1972 OK 83, 497 P.2d 1062 (Okla. 1972).
**Development of educational policy**
N.Y.—Moore v. Board of Regents of University of New York, 89 Misc. 2d 23, 390 N.Y.S.2d 582 (Sup 1977), judgment aff'd, 59 A.D.2d 44, 397 N.Y.S.2d 449 (3d Dep't 1977), judgment aff'd, 44 N.Y.2d 593, 407 N.Y.S.2d 452, 378 N.E.2d 1022 (1978).
**Remedial plan for deficiencies in basic skills**
N.J.—Matter of Board of Ed. of City of Trenton, Mercer County, 176 N.J. Super. 553, 424 A.2d 435 (App. Div. 1980), judgment aff'd, 86 N.J. 327, 431 A.2d 808 (1981).
**Reorganization to satisfy requirement of federal court**
Del.—Opinion of the Justices, 425 A.2d 604 (Del. 1981).
**Student incentive grant program**

Colo.—Americans United for Separation of Church and State Fund, Inc. v. State, 648 P.2d 1072, 5 Ed. Law Rep. 1017 (Colo. 1982).

7 U.S.—Buttfield v. Stranahan, 192 U.S. 470, 24 S. Ct. 349, 48 L. Ed. 525 (1904).

**Emergency powers**

Congress, by delegating to the President power to regulate imports within the national emergency powers standard of Trading With The Enemy Act, has not succeeded in abdicating its constitutional power to regulate foreign commerce since it remains the ultimate decision maker and the fundamental reservoir of such power.

U.S.—U. S. v. Yoshida Intern., Inc., 526 F.2d 560 (C.C.P.A. 1975).

**License fees preventing impairment of national security**

U.S.—Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 96 S. Ct. 2295, 49 L. Ed. 2d 49 (1976).

8 U.S.—Norwegian Nitrogen Products Co. v. U.S., 288 U.S. 294, 53 S. Ct. 350, 77 L. Ed. 796 (1933); E. Dillingham, Inc. v. U.S., 67 Cust. Ct. 457, 328 F. Supp. 1392 (Cust. Ct. 1971).

9 Fla.—Coy v. Florida Birth-Related Neurological Injury Compensation Plan, 595 So. 2d 943 (Fla. 1992).

Mo.—Carter v. Director of Revenue, State of Mo., 805 S.W.2d 154 (Mo. 1991).

Tenn.—Gibson County Special School Dist. v. Palmer, 691 S.W.2d 544, 25 Ed. Law Rep. 1288 (Tenn. 1985).

W. Va.—Appalachian Power Co. v. State Tax Dept. of West Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995).

**Exemption of waste control facilities**

Ind.—Levy Co., Inc. v. State Bd. of Tax Com'rs, 173 Ind. App. 667, 365 N.E.2d 796 (1977).

**Income realized in more than one state**

N.H.—Scott & Williams, Inc. v. Board of Taxation, 117 N.H. 189, 372 A.2d 1305 (1977).

**Unemployment tax**

Kan.—Wesley Medical Center v. McCain, 226 Kan. 263, 597 P.2d 1088 (1979).

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# 16 C.J.S. Constitutional Law § 345

**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**4. Delegation of Powers**

**c. Delegation to Executive**

**(2) Particular Applications of Rules**

## § 345. Public and private employment

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2424(1) to 2424(5), 2429, 2432

**The general rules regarding delegation of authority to the executive have found application in matters relating to public and private employment.**

The general rules regarding delegation of authority to the executive have found application in matters relating to public employment,[1] including such particular aspects as providing for collective bargaining;[2] compensation;[3] tenure, retirement, and discipline;[4] employment situations;[5] and the civil service.[6]

***Private employment; labor relations.***

  

The general rules governing the delegation of authority by the legislature to executive officers or bodies have been applied to various matters relating to the employment of labor, such as apprenticeship programs,[7] the elimination of discriminatory practices,[8] safe and healthy working conditions,[9] wages,[10] hours,[11] and the employment of minors.[12]

Such rules have also been the subject of adjudications concerning various aspects of the regulation of labor relations, such as collective bargaining,[13] unfair labor practices,[14] and arbitration of disputes.[15] Furthermore, the rules concerning the delegation of authority to an executive body have been applied with respect to worker's compensation[16] and unemployment compensation.[17]



Footnotes

1 N.H.—Opinion of the Justices, 115 N.H. 159, 335 A.2d 642 (1975).
Pa.—Dussia v. Barger, 466 Pa. 152, 351 A.2d 667 (1975).
R.I.—Lynch v. King, 120 R.I. 868, 391 A.2d 117 (1978).
**Ethics commissions**
Mass.—Opinion of the Justices to the Senate, 375 Mass. 795, 376 N.E.2d 810 (1978).
Pa.—Pennsylvania State Ass'n of Tp. Sup'rs v. Thornburgh, 45 Pa. Commw. 361, 405 A.2d 614 (1979).
**Option to arm parole agents**
Cal.—California State Employees' Assn. v. Way, 135 Cal. App. 3d 1059, 185 Cal. Rptr. 747 (3d Dist. 1982).

2 Ohio—City of Rocky River v. State Employment Relations Bd., 43 Ohio St. 3d 1, 539 N.E.2d 103 (1989).
Pa.—Pennsylvania School Boards Ass'n, Inc. v. Commonwealth Ass'n of School Adm'rs, Teamsters Local 502, 569 Pa. 436, 805 A.2d 476, 169 Ed. Law Rep. 289, 9 A.L.R.6th 727 (2002).

3 U.S.—Creamer v. U.S., 174 Ct. Cl. 408, 1966 WL 8849 (1966).
Mich.—Holmes v. State Officers Compensation Commission, 57 Mich. App. 255, 226 N.W.2d 90 (1974).
N.J.—Association of New Jersey State College Faculties, Inc. v. Board of Higher Ed., 112 N.J. Super. 237, 270 A.2d 744 (Law Div. 1970).
Ohio—Fuldauer v. City of Cleveland, 32 Ohio St. 2d 114, 61 Ohio Op. 2d 374, 290 N.E.2d 546 (1972).
**Legislative power to increase or reduce salary wanting**
Wash.—State ex rel. Bergin v. Yelle, 11 Wash. 2d 151, 118 P.2d 807 (1941).

4 Ariz.—Dennis v. Jordan, 71 Ariz. 430, 229 P.2d 692 (1951).
Okla.—Hall v. Tirey, 1972 OK 118, 501 P.2d 496 (Okla. 1972).
W. Va.—State ex rel. Thompson v. Morton, 140 W. Va. 207, 84 S.E.2d 791 (1954).

5 Wis.—State (Dept. of Administration) v. Department of Industry, Labor and Human Relations, 77 Wis. 2d 126, 252 N.W.2d 353 (1977).

6 Ariz.—State Personnel Commission v. Webb, 18 Ariz. App. 69, 500 P.2d 329 (Div. 1 1972).
N.Y.—Shelofsky v. Helsby, 39 A.D.2d 168, 332 N.Y.S.2d 723 (3d Dep't 1972), order aff'd, 32 N.Y.2d 54, 343 N.Y.S.2d 98, 295 N.E.2d 774 (1973).
Or.—Myers v. Board of Directors of Tualatin Rural Fire Dist., 5 Or. App. 142, 483 P.2d 95 (1971).
**Reductions in force**
Pa.—Scuoteguazza v. Com., Dept. of Transp., 41 Pa. Commw. 534, 399 A.2d 1155 (1979).
**Regulation of hearing examiners**
U.S.—Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 73 S. Ct. 570, 97 L. Ed. 872 (1953).

7 Fla.—Florida Home Builders Ass'n v. Division of Labor, Bureau of Apprenticeship, 367 So. 2d 219 (Fla. 1979).

8 Iowa—Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758 (Iowa 1971).

9 U.S.—Blocksom & Co. v. Marshall, 582 F.2d 1122 (7th Cir. 1978); Savina Home Industries, Inc. v. Secretary of Labor, 594 F.2d 1358 (10th Cir. 1979).
Pa.—Department of Environmental Protection v. Cumberland Coal Resources, LP, 102 A.3d 962 (Pa. 2014).
**Disclosure of environmental hazards**

U.S.—West Virginia Mfrs. Ass'n v. State of W.Va., 542 F. Supp. 1247 (S.D. W. Va. 1982), judgment aff'd, 714 F.2d 308 (4th Cir. 1983).

10 U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 312 U.S. 126, 312 U.S. 657, 61 S. Ct. 524, 85 L. Ed. 624 (1941).

Ky.—TECO Mechanical Contractor, Inc. v. Com., 366 S.W.3d 386 (Ky. 2012), as corrected, (June 27, 2012).

Neb.—Rocha v. Bakhter Afghan Halal Kababs, Inc., 44 F. Supp. 3d 337 (E.D. N.Y. 2014).

11 Colo.—Smith-Brooks Printing Co. v. Young, 103 Colo. 199, 85 P.2d 39 (1938).

Pa.—Holgate Bros. Co. v. Bashore, 331 Pa. 255, 200 A. 672, 117 A.L.R. 639 (1938).

S.C.—Gasque, Inc. v. Nates, 191 S.C. 271, 2 S.E.2d 36 (1939).

**Executive exemptions**

U.S.—Wirtz v. Patelos Door Corp., 280 F. Supp. 212 (E.D. N.C. 1968).

12 N.Y.—Newton v. Spear & Co., 270 A.D. 667, 62 N.Y.S.2d 918 (3d Dep't 1946), order aff'd, 296 N.Y. 918, 73 N.E.2d 38 (1947).

Wis.—Squires v. Brown, 170 Wis. 165, 174 N.W. 548 (1919).

13 U.S.—Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 61 S. Ct. 908, 85 L. Ed. 1251 (1941).

Cal.—Pandol & Sons v. Agricultural Labor Relations Bd. of California, 429 U.S. 802, 97 S. Ct. 34, 50 L. Ed. 2d 63 (1976).

Neb.—Orleans Ed. Ass'n v. School Dist. of Orleans in Harlan County, 193 Neb. 675, 229 N.W.2d 172 (1975).

N.Y.—Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 280 N.Y. 194, 20 N.E.2d 390 (1939).

14 U.S.—Brown v. Roofers & Waterproofers Union, Local No. 40, 86 F. Supp. 50 (N.D. Cal. 1949).

Neb.—Orleans Ed. Ass'n v. School Dist. of Orleans in Harlan County, 193 Neb. 675, 229 N.W.2d 172 (1975).

N.Y.—In re Almroth, 171 Misc. 314, 14 N.Y.S.2d 63 (Sup 1939), order aff'd, 258 A.D. 378, 17 N.Y.S.2d 225 (3d Dep't 1940).

15 Me.—City of Biddeford by Board of Ed. v. Biddeford Teachers Ass'n, 304 A.2d 387, 68 A.L.R.3d 833 (Me. 1973).

Minn.—City of Richfield v. Local No. 1215, Intern. Ass'n of Fire Fighters, 276 N.W.2d 42 (Minn. 1979).

Pa.—Franklin County Prison Bd. v. Pennsylvania Labor Relations Bd., 491 Pa. 50, 417 A.2d 1138 (1980).

16 Fla.—Rhaney v. Dobbs House, Inc., 415 So. 2d 1277 (Fla. 1st DCA 1982).

Ill.—Segers v. Industrial Com'n, 191 Ill. 2d 421, 247 Ill. Dec. 433, 732 N.E.2d 488 (2000).

Md.—Falik v. Prince George's Hosp. and Medical Center, 322 Md. 409, 588 A.2d 324 (1991).

N.Y.—Okslen Acupuncture, P.C. v. Lawsky, 42 Misc. 3d 299, 976 N.Y.S.2d 647 (Sup 2013).

**Annual rate proposals**

Pa.—Pennsylvania State Ass'n of Tp. Sup'rs v. Com., Ins. Dept., 50 Pa. Commw. 204, 412 A.2d 675 (1980).

**Investigation of fraud**

Mo.—State v. Barnes, 942 S.W.2d 362 (Mo. 1997).

**Loss of hearing**

N.Y.—Gormeley v. New York Daily News, 30 A.D.2d 16, 289 N.Y.S.2d 506 (3d Dep't 1968), order aff'd, 24 N.Y.2d 867, 301 N.Y.S.2d 97, 248 N.E.2d 924 (1969).

**Offsets**

Vt.—Vincent v. Vermont State Retirement Bd., 148 Vt. 531, 536 A.2d 925 (1987).

**Penalty for delay in payments**

Pa.—Keystone Trucking Corp. v. Workmen's Compensation Appeal Bd., 40 Pa. Commw. 326, 397 A.2d 1256 (1979).

**Revocation of self-insured status**

Mich.—S & S Industries, Inc. v. Director of Bureau of Workers' Disability Compensation, 113 Mich. App. 355, 317 N.W.2d 625 (1982).

17 Ariz.—Employment Sec. Commission v. Arizona Citrus Growers, 61 Ariz. 96, 144 P.2d 682 (1944).

Ind.—Schakel v. Review Bd. of Indiana Employment Sec. Division, 142 Ind. App. 475, 235 N.E.2d 497 (1968).

Pa.—Santus v. Unemployment Compensation Bd. of Review, 177 Pa. Super. 496, 110 A.2d 874 (1955).

**Unemployment resulting from labor dispute**

Or.—Scoggins v. Morgan, 11 Or. App. 502, 503 P.2d 509 (1972).

  

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

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**4. Delegation of Powers**

**c. Delegation to Executive**

**(2) Particular Applications of Rules**

## § 346. Business regulation

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2412, 2414(1) to 2414(5), 2426, 2430(4)

**The general rules governing the delegation of authority to the executive branch of government have been applied to various aspects of the regulation of business, such as securities and trade regulation, agriculture, and public utilities and carriers.**

The general rules governing the delegation of authority by the legislature to executive officers and bodies have been applied with respect to various aspects of the regulation of business and industry, such as securities[1] and trade[2] regulation; agriculture, food, and related enterprises or activities;[3] and public utilities and carriers.[4]

Such general rules have also found application in connection with the regulation of banks and banking;[5] industrial loans;[6] insurance,[7] including policy forms[8] and the termination of insurance agency contracts;[9] the manufacture and distribution of alcoholic beverages;[10] horse racing[11] and gambling.[12]

Footnotes

1 U.S.—Charles Hughes & Co. v. Securities and Exchange Commission, 139 F.2d 434 (C.C.A. 2d Cir. 1943).
Cal.—People v. Stewart, 115 Cal. App. 681, 2 P.2d 195 (4th Dist. 1931).
Pa.—York Rys. Co. v. Driscoll, 331 Pa. 193, 200 A. 864 (1938).
**Broker's bond**
Ill.—People, for Use of Moore, v. J.O. Beekman & Co., 347 Ill. 92, 179 N.E. 435 (1931).
**Licensing brokers**
Cal.—Leach v. Daugherty, 73 Cal. App. 83, 238 P. 160 (2d Dist. 1925).

2 U.S.—Continental Oil Co. v. Governor of Maryland, 439 U.S. 884, 99 S. Ct. 233, 58 L. Ed. 2d 200 (1978).
Md.—Governor of Maryland v. Exxon Corp., 279 Md. 410, 370 A.2d 1102 (1977), judgment aff'd, 437 U.S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978).
Mont.—T & W Chevrolet v. Darvial, 196 Mont. 287, 641 P.2d 1368 (1982).
**Advertising**
N.Y.—Urowsky v. Board of Regents of University of New York, 46 A.D.2d 974, 362 N.Y.S.2d 46 (3d Dep't 1974), order aff'd, 38 N.Y.2d 364, 379 N.Y.S.2d 815, 342 N.E.2d 583 (1975).

3 U.S.—U.S. v. Rock Royal Co-op., 307 U.S. 533, 59 S. Ct. 993, 83 L. Ed. 1446 (1939); Baxley v. Alabama Dairy Commission, 360 F. Supp. 1159 (M.D. Ala. 1973).
Ark.—Rose v. Arkansas State Plant Bd., 363 Ark. 281, 213 S.W.3d 607 (2005).
La.—Krielow v. Louisiana Dept. of Agriculture and Forestry, 125 So. 3d 384 (La. 2013).
Mich.—Dukesherer Farms, Inc. v. Ball, 405 Mich. 1, 273 N.W.2d 877 (1979).
**Inspection certificates**
Fla.—Rosslow v. State, 401 So. 2d 1107 (Fla. 1981).
**Racing of drugged animals**
Fla.—Simmons v. Division of Pari-Mutuel Wagering, Dept. of Business Regulation, 407 So. 2d 269 (Fla. 3d DCA 1981), decision aff'd, 412 So. 2d 357 (Fla. 1982).
**Reporting of violations**
U.S.—U.S. v. Rikard, 552 F.2d 153 (5th Cir. 1977).

4 U.S.—American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 67 S. Ct. 133, 91 L. Ed. 103 (1946).
Colo.—Mountain View Elec. Ass'n, Inc. v. Public Utilities Com'n, 686 P.2d 1336 (Colo. 1984).
Fla.—Southern Alliance for Clean Energy v. Graham, 113 So. 3d 742 (Fla. 2013).
Kan.—Kansas One-Call System, Inc. v. State, 294 Kan. 220, 274 P.3d 625 (2012).
N.Y.—Greater New York Taxi Ass'n v. New York City Taxi and Limousine Com'n, 121 A.D.3d 21, 988 N.Y.S.2d 5 (1st Dep't 2014).

5 Fla.—Peoples Bank of Indian River County v. State, Dept. of Banking and Finance, 395 So. 2d 521 (Fla. 1981).
Okla.—Citicorp Sav. and Trust Co. v. Banking Bd. of State of Okl., 1985 OK 63, 704 P.2d 490 (Okla. 1985).
S.D.—First Nat. Bank of Minneapolis v. Kehn Ranch, Inc., 394 N.W.2d 709, 2 U.C.C. Rep. Serv. 2d 399 (S.D. 1986).
**Confidentiality of bank records**
Fla.—Lewis v. Bank of Pasco County, 346 So. 2d 53 (Fla. 1976).

6 Ga.—Scoggins v. Whitfield Finance Co., 242 Ga. 416, 249 S.E.2d 222 (1978).

7 U.S.—Insurers' Action Council, Inc. v. Markman, 490 F. Supp. 921 (D. Minn. 1980), judgment aff'd, 653 F.2d 344 (8th Cir. 1981).
Fla.—Financial Services Com'n v. Florida Ins. Council, Inc., 938 So. 2d 545 (Fla. 1st DCA 2006).
Kan.—Guardian Title Co. v. Bell, 248 Kan. 146, 805 P.2d 33 (1991).
N.C.—State ex rel. Com'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).
N.Y.—Medical Society of State v. Serio, 100 N.Y.2d 854, 768 N.Y.S.2d 423, 800 N.E.2d 728 (2003).
Ohio—State ex rel. Huntington Ins. Agency, Inc. v. Duryee, 73 Ohio St. 3d 530, 1995-Ohio-337, 653 N.E.2d 349 (1995).

Wyo.—Mortgage Guaranty Ins. Corp. v. Langdon, 634 P.2d 509 (Wyo. 1981).

**Brokerage licenses**

Fla.—Brewer v. Insurance Com'r and Treasurer, 392 So. 2d 593 (Fla. 1st DCA 1981).

Mass.—Maryland Cas. Co. v. Commissioner of Ins., 372 Mass. 554, 363 N.E.2d 1087 (1977).

**Cost control**

Mass.—Blue Cross of Massachusetts, Inc. v. Commissioner of Ins., 397 Mass. 117, 489 N.E.2d 1249 (1986).

Ohio—Blue Cross of Northwest Ohio v. Jump, Supt. of Ins., 61 Ohio St. 2d 246, 15 Ohio Op. 3d 257, 400 N.E.2d 892 (1980).

**Holding companies**

Kan.—Blue Cross and Blue Shield of Kansas, Inc. v. Praeger, 276 Kan. 232, 75 P.3d 226 (2003).

**Improper claims practice**

Ill.—Kenilworth Ins. Co. v. Mauck, 50 Ill. App. 3d 823, 8 Ill. Dec. 665, 365 N.E.2d 1051 (1st Dist. 1977).

**No-fault coverage**

N.J.—Sheeran v. Nationwide Mut. Ins. Co., Inc., 80 N.J. 548, 404 A.2d 625 (1979).

Mich.—Underhill v. Safeco Ins. Co., 407 Mich. 175, 284 N.W.2d 463 (1979).

8 Ill.—Stofer v. Motor Vehicle Cas. Co., 68 Ill. 2d 361, 12 Ill. Dec. 168, 369 N.E.2d 875 (1977).

Tex.—Hamaker v. American States Ins. Co. of Texas, 493 S.W.2d 893 (Tex. Civ. App. Houston 1st Dist. 1973), writ refused n.r.e., (July 11, 1973).

9 N.H.—Smith Ins., Inc. v. Grievance Committee, 120 N.H. 856, 424 A.2d 816 (1980).

10 Cal.—Walsh v. Kirby, 13 Cal. 3d 95, 118 Cal. Rptr. 1, 529 P.2d 33 (1974).

Mich.—Bundo v. Liquor Control Commission, 92 Mich. App. 20, 283 N.W.2d 860 (1979).

R.I.—Thompson v. Town of East Greenwich, 512 A.2d 837 (R.I. 1986).

11 U.S.—Lemberos v. Laurel Racecourse, Inc., 489 F. Supp. 1376 (D. Md. 1980).

Fla.—Solimena v. State, Dept. of Business Regulation, Division of Pari-Mutuel Wagering, 402 So. 2d 1240 (Fla. 3d DCA 1981).

Pa.—Casino Free Philadelphia v. Pennsylvania Gaming Control Bd., 594 Pa. 202, 934 A.2d 1249 (2007).

12 Fla.—Advisory Opinion to Atty. Gen. re Ltd. Casinos, 644 So. 2d 71 (Fla. 1994).

La.—Polk v. Edwards, 626 So. 2d 1128 (La. 1993).

W. Va.—State ex rel. Mountaineer Park, Inc. v. Polan, 190 W. Va. 276, 438 S.E.2d 308 (1993).

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

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**B. Legislative Powers and Delegation Thereof**

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**(2) Particular Applications of Rules**

## § 347. Business regulation—Licensing of professions and occupations

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2425(3)

**The general rules governing the delegation of authority to the executive branch of government have been applied to the licensing of professions and occupations.**

There have been adjudications with regard to the delegation of authority by the legislature to executive officers or bodies relating to the licensing of professions and occupations,[1] including such particular matters as prescribing qualifications and examinations, and passing on the qualifications of particular applicants,[2] and the revocation, suspension, and reinstatement of licenses.[3] In this connection, while there is authority that a provision authorizing a board of dentistry to suspend or revoke the license of a dentist for being guilty of "dishonorable or unprofessional conduct" in the practice of dentistry provides insufficient standards,[4] the term "unprofessional conduct" has also been deemed constitutionally adequate as a directive giving a board of dental examiners authority to prescribe standards under which its licensees will be subject to professional discipline.[5]

  

Footnotes

1 U.S.—U.S. v. Gross, 313 F. Supp. 1330 (S.D. Ind. 1970), order aff'd, 451 F.2d 1355 (7th Cir. 1971).
Ark.—Holloway v. Arkansas State Bd. of Architects, 352 Ark. 427, 101 S.W.3d 805 (2003).
Ill.—City of Springfield v. Hall, 93 Ill. App. 3d 860, 49 Ill. Dec. 232, 417 N.E.2d 1059 (4th Dist. 1981).
**Adult care homes**
Kan.—Boswell, Inc. v. Harkins, 230 Kan. 738, 640 P.2d 1208 (1982).
Mich.—City of Livonia v. Department of Social Services, 423 Mich. 466, 378 N.W.2d 402 (1985).
**Nursing homes**
Fla.—High Ridge Management Corp. v. State, 354 So. 2d 377 (Fla. 1977).
N.J.—Merry Heart Nursing & Convalescent Home, Inc. v. Dougherty, 131 N.J. Super. 412, 330 A.2d 370 (App. Div. 1974).
N.Y.—Bergman v. Whalen, 89 Misc. 2d 237, 391 N.Y.S.2d 341 (Sup 1977).
**Local mental health facilities**
Me.—Northeast Occupational Exchange, Inc. v. State, 540 A.2d 1115 (Me. 1988).
**Polygraph examiners**
U.S.—Heisse v. State of Vt., 519 F. Supp. 36 (D. Vt. 1980).
**Treatment of drug addicts and abusers**
Ill.—Roque v. Quern, 90 Ill. App. 3d 1015, 46 Ill. Dec. 439, 414 N.E.2d 161 (1st Dist. 1980).

2 U.S.—Douglas v. Noble, 261 U.S. 165, 43 S. Ct. 303, 67 L. Ed. 590 (1923); Henkes v. Fisher, 314 F. Supp. 101 (D. Mass. 1970), judgment aff'd, 400 U.S. 985, 91 S. Ct. 462, 27 L. Ed. 2d 436 (1971).
Fla.—Florida State Bd. of Architecture v. Wasserman, 377 So. 2d 653 (Fla. 1979).
Ky.—Curd v. Kentucky State Bd. of Licensure for Professional Engineers and Land Surveyors, 433 S.W.3d 291 (Ky. 2014).
N.Y.—Employers Claim Control Service Corp. v. Workmen's Compensation Bd., 35 N.Y.2d 492, 364 N.Y.S.2d 149, 323 N.E.2d 689 (1974).
Ohio—Provens v. Ohio Real Estate Commission, 45 Ohio App. 2d 45, 74 Ohio Op. 2d 87, 341 N.E.2d 329 (10th Dist. Franklin County 1975).
**Admission to bar**
N.C.—Bowens v. Board of Law Examiners of State of N. C., 57 N.C. App. 78, 291 S.E.2d 170 (1982).
Wash.—Application of Schatz, 80 Wash. 2d 604, 497 P.2d 153 (1972).
**Practice of medicine**
Tex.—Martinez v. Texas State Bd. of Medical Examiners, 476 S.W.2d 400 (Tex. Civ. App. San Antonio 1972), writ refused n.r.e., (May 17, 1972).

3 Fla.—Sloban v. Florida Bd. of Pharmacy, 982 So. 2d 26 (Fla. 1st DCA 2008).
N.J.—Matter of Kerlin, 151 N.J. Super. 179, 376 A.2d 939 (App. Div. 1977).
N.Y.—Sturman v. Public Health Council, 58 A.D.2d 389, 397 N.Y.S.2d 168 (3d Dep't 1977), judgment aff'd, 47 N.Y.2d 837, 418 N.Y.S.2d 584, 392 N.E.2d 570 (1979).
**Employing procurers**
Statute providing that dishonorable conduct in a professional practice will include employing what is known as procurers to obtain business was not unconstitutional on the ground that it constituted an improper delegation of the legislative power to board.
Mo.—Bresler v. Tietjen, 424 S.W.2d 65 (Mo. 1968).

4 Mich.—State Bd. of Dentistry v. Blumer, 78 Mich. App. 679, 261 N.W.2d 186 (1977).

5 Or.—Megdal v. Oregon State Bd. of Dental Examiners, 288 Or. 293, 605 P.2d 273 (1980).

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**Corpus Juris Secundum** | June 2021 Update

**Constitutional Law**
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**B. Legislative Powers and Delegation Thereof**

**4. Delegation of Powers**

**c. Delegation to Executive**

**(2) Particular Applications of Rules**

## § 348. Conservation, natural resources, and environmental protection

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2419

**The legislature may delegate to executive officers or bodies the power to administer statutes relating to the conservation or use of natural resources and the protection of the environment.**

The general rules which govern the delegation of authority to executive officers and bodies have been applied with respect to conservation or the use of natural resources;[1] the administration of statutes relating to the creation and operation of water storage, hydro-electric, irrigation, flood control, or drainage projects or districts;[2] and the navigability of waters.[3] Such general rules also find application in connection with the regulation of matters relating to game, birds, or fish[4] and minerals and mineral products.[5] The rules in question have also been applied in cases dealing with the protection of the environment,[6] including such particular matters as the control of air[7] and water[8] pollution, and the preservation of coast[9] and forest[10] areas, rivers,[11] and watersheds and wetlands.[12]

  

Footnotes

1 U.S.—Champlin Refining Co. v. Corporation Com'n of State of Oklahoma, 51 F.2d 823 (W.D. Okla. 1931), modified on other grounds, 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062, 86 A.L.R. 403 (1932).
Mich.—Westervelt v. Natural Resources Commission, 402 Mich. 412, 263 N.W.2d 564 (1978).
Mont.—Thompson v. Tobacco Root Co-op. State Grazing Dist., 121 Mont. 445, 193 P.2d 811 (1948).
**Need for protection of land**
Criteria for designation of an area of critical state concern as set forth in the statute delegating power to establish the government of land development are constitutionally defective because they reposit in the commission the fundamental legislative task of determining which geographic areas and resources are in the greatest need of protection.
Fla.—Askew v. Cross Key Waterways, 372 So. 2d 913 (Fla. 1978).

2 Neb.—State v. Cutright, 193 Neb. 303, 226 N.W.2d 771 (1975).
N.Y.—Rockland County Anti-Reservoir Ass'n v. Duryea, 282 A.D. 457, 123 N.Y.S.2d 445 (3d Dep't 1953).
S.D.—Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559 (S.D. 1981).
**Allocation of waters**
Ill.—Village of Riverwoods v. Department of Transp., 77 Ill. 2d 130, 32 Ill. Dec. 325, 395 N.E.2d 555 (1979).
Tex.—Burgess v. American Rio Grande Land & Irr. Co., 295 S.W. 649 (Tex. Civ. App. San Antonio 1927), writ refused, (Oct. 12, 1927).
**Groundwater**
U.S.—Cherry v. Steiner, 543 F. Supp. 1270 (D. Ariz. 1982), judgment aff'd, 716 F.2d 687 (9th Cir. 1983).
**Permits for hydraulic projects**
Wash.—State v. Crown Zellerbach Corp., 92 Wash. 2d 894, 602 P.2d 1172 (1979).
**Publication of wilderness areas maps**
U.S.—National Ass'n of Property Owners v. U. S., 499 F. Supp. 1223 (D. Minn. 1980), judgment aff'd, 660 F.2d 1240 (8th Cir. 1981).

3 U.S.—U.S. v. Commodore Park, 324 U.S. 386, 65 S. Ct. 803, 89 L. Ed. 1017 (1945).
Kan.—Consumers Sand Co. v. Executive Council of State of Kansas, 126 Kan. 233, 268 P. 123 (1928).

4 U.S.—U.S. v. Brown, 552 F.2d 817 (8th Cir. 1977).
Mass.—Smith v. Division of Marine Fisheries, 6 Mass. App. Ct. 971, 384 N.E.2d 233 (1979).
Ohio—State v. Switzer, 22 Ohio St. 2d 47, 51 Ohio Op. 2d 69, 257 N.E.2d 908 (1970).
Okla.—State v. Smith, 1975 OK CR 157, 539 P.2d 754 (Okla. Crim. App. 1975).
**Banning lead shotgun pellets**
S.D.—South Dakota Migratory Bird Ass'n, By and Through Brancel v. South Dakota Game, Fish and Parks Commission, 312 N.W.2d 374 (S.D. 1981).
**Commercial fishing**
Cal.—Salmon Trollers Marketing Assn. v. Fullerton, 124 Cal. App. 3d 291, 177 Cal. Rptr. 362 (1st Dist. 1981).
Mich.—State Conservation Dept. v. Seaman, 396 Mich. 299, 240 N.W.2d 206 (1976).

5 U.S.—Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S. Ct. 907, 84 L. Ed. 1263 (1940).
Kan.—Cities Service Gas Co. v. State Corp. Commission, 197 Kan. 338, 416 P.2d 736 (1966).
Ohio—State v. Consolidation Coal Co., Central Division, 43 Ohio Misc. 77, 72 Ohio Op. 2d 410, 335 N.E.2d 403 (County Ct. 1974).
Okla.—Amax Petroleum Corp. v. Corporation Commission, 1976 OK 91, 552 P.2d 387 (Okla. 1976).
**Dewatering of surface mines**
Md.—Maryland Aggregates Ass'n, Inc. v. State, 337 Md. 658, 655 A.2d 886 (1995).
**Spacing of wells**
N.M.—Rutter & Wilbanks Corp. v. Oil Conservation Commission, 1975-NMSC-006, 87 N.M. 286, 532 P.2d 582 (1975).

6 Cal.—City of Santa Ana v. City of Garden Grove, 100 Cal. App. 3d 521, 160 Cal. Rptr. 907 (4th Dist. 1979).
Del.—State v. Braun, 378 A.2d 640 (Del. Super. Ct. 1977).
Ill.—Rockford Drop Forge Co. v. Pollution Control Bd., 79 Ill. 2d 271, 37 Ill. Dec. 600, 402 N.E.2d 602 (1980).

Me.—In re Spring Valley Development, 300 A.2d 736 (Me. 1973).

**Hazardous waste control**

La.—State v. All Pro Paint & Body Shop, Inc., 639 So. 2d 707 (La. 1994).

**High-voltage transmission lines**

Minn.—No Power Line, Inc. v. Minnesota Environmental Quality Council, 262 N.W.2d 312 (Minn. 1977).

**Imposition of penalties**

Ill.—City of Waukegan v. Pollution Control Bd., 57 Ill. 2d 170, 311 N.E.2d 146, 81 A.L.R.3d 1246 (1974).

S.C.—City of Rock Hill v. South Carolina Dept. of Health and Environmental Control, 302 S.C. 161, 394 S.E.2d 327 (1990).

**Solid waste disposal**

Pa.—Com. v. Parker White Metal Co., 512 Pa. 74, 515 A.2d 1358 (1986).

R.I.—Davis v. Wood, 427 A.2d 332 (R.I. 1981).

Wis.—Wisconsin Solid Waste Recycling Authority v. Earl, 70 Wis. 2d 464, 235 N.W.2d 648 (1975).

7 U.S.—South Terminal Corp. v. E.P.A., 504 F.2d 646, 30 A.L.R. Fed. 109 (1st Cir. 1974).

Del.—State v. Braun, 378 A.2d 640 (Del. Super. Ct. 1977).

Ohio—State v. Acme Scrap Iron and Metal, 49 Ohio App. 2d 371, 3 Ohio Op. 3d 444, 361 N.E.2d 250 (11th Dist. Ashtabula County 1974).

Tex.—State v. Rhine, 255 S.W.3d 745 (Tex. App. Fort Worth 2008), petition for discretionary review granted, (Aug. 20, 2008) and judgment aff'd, 297 S.W.3d 301 (Tex. Crim. App. 2009).

**Indoor air pollution**

Minn.—Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238 (Minn. 1984).

**Vehicle emissions inspection program**

Md.—Department of Transp. v. Armacost, 311 Md. 64, 532 A.2d 1056 (1987).

8 Ill.—Meadowlark Farms, Inc. v. Illinois Pollution Control Bd., 17 Ill. App. 3d 851, 308 N.E.2d 829 (5th Dist. 1974).

Minn.—Coalition of Greater Minnesota Cities v. Minnesota Pollution Control Agency, 765 N.W.2d 159 (Minn. Ct. App. 2009).

Neb.—State ex rel. Meyer v. Duxbury, 183 Neb. 302, 160 N.W.2d 88 (1968).

Wis.—State ex rel. La Follette v. Reuter, 33 Wis. 2d 384, 147 N.W.2d 304 (1967).

**Cyanide dumping**

Ill.—Airtex Products, Inc. v. Pollution Control Bd., 15 Ill. App. 3d 238, 303 N.E.2d 498 (5th Dist. 1973), judgment aff'd, 60 Ill. 2d 204, 326 N.E.2d 406 (1975).

9 N.J.—Atlantic City Elec. Co. v. Bardin, 145 N.J. Super. 438, 368 A.2d 366 (App. Div. 1976).

R.I.—Milardo v. Coastal Resources Management Council of Rhode Island, 434 A.2d 266 (R.I. 1981).

**Private beaches**

Del.—Atlantis I Condominium Ass'n v. Bryson, 403 A.2d 711 (Del. 1979).

**Public beaches**

Haw.—State v. Willburn, 49 Haw. 651, 426 P.2d 626 (1967).

10 U.S.—Light v. U.S., 220 U.S. 523, 31 S. Ct. 485, 55 L. Ed. 570 (1911).

N.Y.—Helms v. Reid, 90 Misc. 2d 583, 394 N.Y.S.2d 987 (Sup 1977).

**State parks**

Iowa—Mathiasen v. State Conservation Commission, 246 Iowa 905, 70 N.W.2d 158 (1955).

N.Y.—Adirondack Park Agency v. Ton-Da-Lay Associates, 61 A.D.2d 107, 401 N.Y.S.2d 903 (3d Dep't 1978).

**Cutting and trimming trees**

Md.—Chesapeake & Potomac Telephone Co. of Baltimore City v. Goldsborough, 125 Md. 666, 94 A. 322 (1915).

11 Me.—Swift River Co., Inc. v. Board of Environmental Protection, 550 A.2d 359 (Me. 1988).

12 Mass.—Com. v. Clemmey, 447 Mass. 121, 849 N.E.2d 844 (2006).

N.C.—Town of Spruce Pine v. Avery County, 346 N.C. 787, 488 S.E.2d 144 (1997).

Fla.—Albrecht v. Department of Environmental Regulation, 353 So. 2d 883 (Fla. 1st DCA 1977).

R.I.—J. M. Mills, Inc. v. Murphy, 116 R.I. 54, 352 A.2d 661 (1976).

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## § 349. Controlled substances regulation

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2422(1) to 2422(3), 2427(1)

**The general rules relating to delegation of power to the executive branch have been applied in connection with the designation and control of dangerous drugs and controlled substances.**

The general rules relating to delegation of power to the executive branch have been applied in connection with the designation and control of dangerous drugs and controlled substances.[1]

A provision making it unlawful for a person to bring a controlled substance into the state unless the person is licensed to do so by an appropriate federal agency does not constitute an unlawful delegation of legislative authority where the conduct proscribed by the statute has been completely defined by the legislature and the range of criminality will not change in the future with shifting federal standards.[2]

  

Footnotes

1 U.S.—Touby v. U.S., 500 U.S. 160, 111 S. Ct. 1752, 114 L. Ed. 2d 219 (1991).
Nev.—Sheriff, Clark County v. Luqman, 101 Nev. 149, 697 P.2d 107 (1985).
Ohio—State v. Klinck, 44 Ohio St. 3d 108, 541 N.E.2d 590 (1989).

2 Fla.—Adoue v. State, 408 So. 2d 567 (Fla. 1981).

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## § 350. Crimes and criminal prosecution

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2415(1) to 2415(5)

**While the legislature may not empower executive officers or agencies to define crimes or prescribe punishment, it may make violations of the rules of such officers or agencies a crime punishable in a manner prescribed by statute.**

Generally, the legislature may not authorize executive agencies to define, or to declare acts which will constitute, crimes.[1] Thus, it has been ruled by some authorities that the legislative department may not delegate to an executive officer or body the power to determine what acts in relation to a certain subject matter will constitute a crime,[2] but it may authorize an officer or executive body to make rules and regulations for the purpose of carrying out the objects of a statute, and may make a violation of these rules a criminal offense, punishable by law.[3]

  

In the field of criminal law, the delegation of authority by a legislature to executive officers or agencies must incorporate sufficiently precise standards,[4] inasmuch as basic policy decisions may not be abdicated to the personal predilections of the police or prosecutors.[5]

***Prosecutorial discretion.***

The delegation of power to an executive officer to exercise prosecutorial discretion,[6] provided that it is not unfettered,[7] has been upheld. Such rule has been applied with respect to discretion regarding the institution[8] and manner[9] of prosecution, such as the selection of which distinct offense arising from a single transaction is to be the basis of the prosecution,[10] the prosecution as an habitual offender,[11] or prosecution of a juvenile, under certain circumstances, as an adult.[12]



Footnotes

1 Colo.—People v. Lepik, 629 P.2d 1080 (Colo. 1981).
La.—State v. Taylor, 479 So. 2d 339 (La. 1985).
Wash.—State v. Crown Zellerbach Corp., 92 Wash. 2d 894, 602 P.2d 1172 (1979).

2 U.S.—Texas Co. v. Montgomery, 73 F. Supp. 527 (E.D. La. 1947), judgment aff'd, 332 U.S. 827, 68 S. Ct. 209, 92 L. Ed. 402 (1947).
Ga.—Howell v. State, 238 Ga. 95, 230 S.E.2d 853 (1976).
Mo.—State v. Raccagno, 530 S.W.2d 699 (Mo. 1975).
As to controlled substances, see § 349.

3 U.S.—Garcia v. U.S., 439 U.S. 1079, 99 S. Ct. 860, 59 L. Ed. 2d 49 (1979).
Cal.—People v. Firstenberg, 92 Cal. App. 3d 570, 155 Cal. Rptr. 80 (2d Dist. 1979).
Md.—State v. Phillips, 210 Md. App. 239, 63 A.3d 51 (2013).
Wash.—State v. Chavez, 134 Wash. App. 657, 142 P.3d 1110 (Div. 2 2006), aff'd, 163 Wash. 2d 262, 180 P.3d 1250 (2008).
**Definition of terms**
U.S.—U.S. v. Womack, 654 F.2d 1034, 8 Fed. R. Evid. Serv. 1528 (5th Cir. 1981).
**Limited penalty**
Wash.—State v. Crown Zellerbach Corp., 92 Wash. 2d 894, 602 P.2d 1172 (1979).

4 U.S.—Florida Businessmen for Free Enterprise v. City of Hollywood, 673 F.2d 1213 (11th Cir. 1982); U.S. v. Pray, 452 F. Supp. 788 (M.D. Pa. 1978).
Pa.—Com. v. Howard, 248 Pa. Super. 246, 375 A.2d 79 (1977).

5 U.S.—Smith v. Goguen, 415 U.S. 566, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974); Florida Businessmen for Free Enterprise v. City of Hollywood, 673 F.2d 1213 (11th Cir. 1982).
**Discretion of police to determine criminal conduct in failure to stop**
The failure to include within the statute the amount of time that must elapse or the distance that must be traveled before the driver's failure to stop becomes criminal conduct is not an improper delegation of legislative power to the law enforcement officer who arrests a driver or issues a citation charging the driver with violating the statute.
Ga.—Harbuck v. State, 280 Ga. 775, 631 S.E.2d 351 (2006).

6 Colo.—People In Interest of D.G., 733 P.2d 1199 (Colo. 1987).
Ind.—Thomas v. State, 471 N.E.2d 681 (Ind. 1984).
Vt.—Office of State's Attorney Windsor County v. Office of Atty. Gen., 138 Vt. 10, 409 A.2d 599 (1979).
Wyo.—Hansen v. State, 904 P.2d 811 (Wyo. 1995).
**Death penalty**
Ill.—People v. Guest, 115 Ill. 2d 72, 104 Ill. Dec. 698, 503 N.E.2d 255 (1986).
**Dangerous special offender designation**
N.D.—State v. Olson, 274 N.W.2d 190 (N.D. 1978).

**Request for death penalty sentencing proceeding**

Ill.—People ex rel. Carey v. Cousins, 77 Ill. 2d 531, 34 Ill. Dec. 137, 397 N.E.2d 809 (1979).

7 U.S.—Roush v. White, 389 F. Supp. 396 (N.D. Ohio 1975).

**Calling of special grand jury**

U.S.—U.S. ex rel. Womack v. U.S. Atty. for Northern Dist. of Ill., 348 F. Supp. 1331 (N.D. Ill. 1972).

8 Kan.—State v. Sherk, 217 Kan. 726, 538 P.2d 1399 (1975).

**Deferring prosecution of accused with alcohol problem**

Wash.—State ex rel. Schillberg v. Cascade Dist. Court, 94 Wash. 2d 772, 621 P.2d 115 (1980).

9 Conn.—State v. Anonymous (1972-1), 29 Conn. Supp. 333, 287 A.2d 111 (Super. Ct. 1972).

Ill.—People v. Sievers, 56 Ill. App. 3d 880, 14 Ill. Dec. 509, 372 N.E.2d 705 (4th Dist. 1978).

10 U.S.—U. S. v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979).

Ill.—People v. Graham, 25 Ill. App. 3d 853, 323 N.E.2d 441 (3d Dist. 1975).

Wash.—State v. Rentfrow, 15 Wash. App. 837, 552 P.2d 202 (Div. 1 1976).

11 U.S.—Pierce v. Parratt, 666 F.2d 1205 (8th Cir. 1981).

Colo.—People v. Gallegos, 644 P.2d 920 (Colo. 1982).

Ga.—Knight v. State, 243 Ga. 770, 257 S.E.2d 182 (1979).

12 Fla.—State v. Cain, 381 So. 2d 1361 (Fla. 1980).

Ill.—People v. Sprinkle, 56 Ill. 2d 257, 307 N.E.2d 161 (1974).

Neb.—State v. Grayer, 191 Neb. 523, 215 N.W.2d 859 (1974).

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# 16 C.J.S. Constitutional Law § 351

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## § 351. Crimes and criminal prosecution—Punishment and confinement

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2415(1) to 2415(5)

**The legislature may not authorize executive agencies to prescribe the penalty or punishment for crimes, but it may grant them the power to administer correctional institutions.**

The legislature may not authorize executive agencies to prescribe the penalty or punishment for crimes,[1] but it may grant them the power to administer correctional institutions,[2] providing adequate standards are expressed by the legislature.[3] Executive bodies may also be vested with authority to determine within prescribed limits how long convicted persons may be detained[4] and to determine the conditions under which to grant[5] or to revoke[6] parole. There may also be delegated the power to release a prisoner, under certain conditions such as credit for good behavior, prior to the expiration of the maximum period of an imposed sentence.[7] The legislature may authorize executive bodies to determine the place of confinement.[8]

  

Statutes adding lethal injection as a method of execution,[9] authorizing an executive body to determine the lethal substance to be used in the execution of a condemned prisoner by an intravenous injection[10] or charging the superintendent of a correctional facility with the supervision of punishment by death by lethal injection[11] have been upheld as a valid delegation of legislative power.



Footnotes

1 U.S.—Moran v. School Dist. #7, Yellowstone County, 350 F. Supp. 1180 (D. Mont. 1972).
Cal.—People v. Adams, 43 Cal. App. 3d 697, 117 Cal. Rptr. 905 (3d Dist. 1974).
Wash.—State v. Crown Zellerbach Corp., 92 Wash. 2d 894, 602 P.2d 1172 (1979).
**Degree of crime charged**
(1) Determining the criteria that define who is eligible for a sentence of death, by defining the substantive crime and the additional factors that make a person who commits that crime eligible for the death penalty, is a legislative function; accordingly, under the separation of powers doctrine, the legislature may not delegate to the executive branch the authority to enlarge the class of people who are eligible for a death sentence by allowing the executive to either define new substantive crimes or to add to the gateway mental states and statutory aggravating factors set forth in the statute.
N.H.—State v. Addison, 165 N.H. 381, 87 A.3d 1 (2013).
(2) Murder statute penalty, with mitigating factor, and penalty under a manslaughter statute are identical, and thus, the murder and manslaughter statutes do not delegate to the State's attorney the authority to establish the limits of penalties by his or her choice of statute under which to prosecute.
Conn.—State v. Anonymous (1976-5), 33 Conn. Supp. 28, 359 A.2d 715 (Super. Ct. 1976).
**Violation of prison rules**
Ark.—State v. Bruton, 246 Ark. 293, 437 S.W.2d 795 (1969).

2 N.J.—Avant v. Clifford, 67 N.J. 496, 341 A.2d 629 (1975).
**Compensation for convict labor**
Ky.—State Board of Charities and Corrections v. Hays, 190 Ky. 147, 227 S.W. 282 (1920).
**Contact visitation**
U.S.—Ybarra v. Nevada Bd. of State Prison Com'rs, 520 F. Supp. 1000 (D. Nev. 1981).

3 Colo.—People v. Lepik, 629 P.2d 1080 (Colo. 1981).
**Pat-down searches of visitors**
U.S.—Ybarra v. Nevada Bd. of State Prison Com'rs, 520 F. Supp. 1000 (D. Nev. 1981).

4 Cal.—Ex parte Herrera, 23 Cal. 2d 206, 143 P.2d 345 (1943) (disapproved of on other grounds by, People v. Olivas, 17 Cal. 3d 236, 131 Cal. Rptr. 55, 551 P.2d 375 (1976)).
**Discretion to seek a life sentence**
Statutes allowing federal prosecutors to decide whether to seek a mandatory life sentence for a serious violent felony, based on the defendant having prior convictions for a combination of two or more serious violent felonies or serious drug offenses, do not violate the nondelegation doctrine or principles of constitutional separation of powers, by allegedly delegating to the Executive Branch the power of Congress to impose mandatory minimum sentences for certain crimes, without an intelligible principle to constrain the Executive Branch's discretion.
U.S.—U.S. v. Harris, 741 F.3d 1245 (11th Cir. 2014).

5 U.S.—Bachman v. Jeffes, 488 F. Supp. 107 (M.D. Pa. 1980).
Iowa—State v. Watts, 186 N.W.2d 611 (Iowa 1971).
N.C.—Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

6 Iowa—Kirkpatrick v. Hollowell, 197 Iowa 927, 196 N.W. 91 (1923), opinion amended on other grounds, 197 Iowa 927, 198 N.W. 81 (1924).
Kan.—Ex parte Tabor, 173 Kan. 686, 250 P.2d 793 (1952).

7 W. Va.—Woodring v. Whyte, 161 W. Va. 262, 242 S.E.2d 238 (1978).
**Work release or furlough programs**
U.S.—Marciano v. Coughlin, 510 F. Supp. 1034 (E.D. N.Y. 1981).

8 Ind.—State ex rel. Reed v. Howard, 224 Ind. 515, 69 N.E.2d 172 (1946).
Wis.—In re Linden, 112 Wis. 523, 88 N.W. 645 (1902).
**State prisoners in federal institutions**
U.S.—U. S. ex rel. Gereau v. Henderson, 526 F.2d 889 (5th Cir. 1976).

9 Ariz.—Cook v. State, 230 Ariz. 185, 281 P.3d 1053 (Ct. App. Div. 1 2012).
Fla.—Bryan v. State, 753 So. 2d 1244 (Fla. 2000).

10 Idaho—State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981).
Tex.—Felder v. State, 564 S.W.2d 776 (Tex. Crim. App. 1978).
**Guidance required**
Method of Execution Act (MEA) was unconstitutional on its face, as it violated the separation of powers provision where the MEA allowed the Department of Correction (DOC) to determine the chemicals to be used for lethal injection and gave no guidance regarding the selection of those chemicals, the list of chemicals was not exhaustive and included, as an option, broad language that any other chemical or chemicals could be used, and thus, the legislature abdicated its responsibility and passed to the DOC the unfettered discretion to determine all protocol and procedures, most notably the chemicals to be used, for a state execution.
Ark.—Hobbs v. Jones, 2012 Ark. 293, 412 S.W.3d 844 (2012).

11 Wash.—Brown v. Vail, 169 Wash. 2d 318, 237 P.3d 263 (2010).

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# 16 C.J.S. Constitutional Law § 352

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**Constitutional Law**
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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

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## § 352. Foreign affairs and national defense; citizens and aliens

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2413, 2420, 2423

**The constitutionality of various delegations of authority by Congress to federal executive officers or bodies in the areas of foreign relations and trade, and with respect to national defense, have been adjudicated.**

When Congress legislates regarding foreign affairs or immigration control, it is not dealing alone with legislative powers but is implementing inherent executive powers; because these powers are also inherent in the executive department of the sovereign, Congress may, in broad terms, authorize the executive to exercise them.[1] Although the authority delegated by Congress to the executive branch of government is broader in foreign than in domestic affairs,[2] a statute which deals with foreign relations may not grant the executive totally unrestricted freedom of choice.[3] Accordingly, the delegation of power by Congress to regulate the right of exit of citizens from the United States is subject to standards which must be adequate to pass scrutiny by accepted tests.[4] Congress may delegate to the executive the authority to admit or exclude certain classes of aliens,[5] to impose conditions on their entry or reentry,[6] and to expel them upon a violation of such conditions.[7]

  

Congress may delegate to the President authority to order to active duty ready reserve units[8] and to raise armed forces by means of a selective draft[9] as well as to make rules and regulations for that purpose,[10] the violation of which may be declared to be a criminal offense.[11] Adjudications have been made with respect to the constitutionality of legislative delegations of authority to executive bodies or officers in connection with various military matters, such as veterans' benefits,[12] criminal jurisdiction to persons who commit criminal acts while a member of the Armed Forces who later cease to be subject to military jurisdiction,[13] involuntary retirement of officers,[14] and conscientious objectors.[15]

***Export of arms.***

Congress may delegate to the President the authority to prohibit the sale of arms and munitions of war to particular countries[16] in accordance with a defined policy and definite standards;[17] federal regulations designating which items require export licenses from the Department of State do not involve an improper delegation of legislative authority,[18] nor do those which impose criminal penalties on the export, or the attempt to export, of such items without a license.[19]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Presidential Proclamation indefinitely barring entry by nationals from six predominantly Muslim countries did not violate Establishment Clause, on rational basis review of constitutional claim concerning entry of foreign nationals; quite apart from any religious hostility allegedly reflected in President's statements as presidential candidate and as President, there was persuasive evidence that the facially neutral Proclamation had a legitimate grounding in national security concerns in preventing entry of nationals who could not be adequately vetted and in inducing other nations to improve their identity-management and information-sharing practices, and Proclamation's policy denying certain foreign nationals the privilege of admission reflected results of worldwide review process undertaken by multiple Cabinet officials and their agencies. U.S.C.A. Const.Amend. 1; Presidential Proclamation No. 9645, Sept. 24, 2017, 82 Fed. Reg. 45161, 2017 WL 4231190. Trump v. Hawaii, 138 S. Ct. 2392 (2018).

Arms Export Control Act (AECA) did not unconstitutionally delegate legislative authority to executive, despite defendant's argument that length and complexity of United States Munitions List (USML) promulgated by President pursuant to the AECA rendered it, and thus the AECA, unconstitutionally vague; ablative materials defendant exported or attempted to export were unambiguously included in the USML during the time of his offense conduct, and defendant was made aware by several e-mails, both from a distributor in the United States and a customer in Taiwan, that ablative materials were included in the USML. 22 U.S.C.A. § 2778; 22 C.F.R. § 121.1. United States v. Henry, 888 F.3d 589 (2d Cir. 2018).

National security is not a talismanic incantation that, once invoked, can support any and all exercise of the President's delegated executive power, under the INA, to exclude entry of those classes of people for whom entry would be detrimental to interests of United States. Immigration and Nationality Act § 212(f), 8 U.S.C.A. § 1182(f). Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017).

**[END OF SUPPLEMENT]**



Footnotes

1 U.S.—Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119 (D.D.C. 2007).

2 U.S.—Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965); Veterans and Reservists for Peace in Vietnam v. Regional Commissioner of Customs, Region II, 459 F.2d 676 (3d Cir. 1972); Nielsen v. Secretary of Treasury, 424 F.2d 833 (D.C. Cir. 1970).

**International Emergency Economic Powers Act**

U.S.—U.S. v. Chalmers, 474 F. Supp. 2d 555 (S.D. N.Y. 2007).

**Explication of terms of treaty**

U.S.—U.S. v. Mackie, 681 F.2d 1121 (9th Cir. 1982).

**Flow of currency to foreign nations**

U.S.—Teague v. Regional Commissioner of Customs, Region II, 404 F.2d 441 (2d Cir. 1968).

**Freezing foreign accounts**

U.S.—Sardino v. Federal Reserve Bank of New York, 361 F.2d 106 (2d Cir. 1966); Hartmann v. Federal Reserve Bank of Philadelphia, 55 F. Supp. 801 (E.D. Pa. 1944).

3 U.S.—U.S. v. Approximately 633.79 Tons of Yellowfin Tuna, 383 F. Supp. 659 (S.D. Cal. 1974).

**Passports**

Statute authorizing the Secretary of State to limit issuance and validation of passports, construed as authorizing only such refusals and restrictions which it could fairly be argued were adopted by Congress in light of prior administrative practice, was not an invalid delegation of legislative power.

U.S.—Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965).

4 U.S.—Kent v. Dulles, 357 U.S. 116, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958).

5 U.S.—Carlson v. Landon, 342 U.S. 524, 72 S. Ct. 525, 96 L. Ed. 547 (1952).

6 U.S.—Cermeno-Cerna v. Farrell, 291 F. Supp. 521 (C.D. Cal. 1968) (overruled in part on other grounds by, Sam Andrews' Sons v. Mitchell, 457 F.2d 745 (9th Cir. 1972)).

7 U.S.—Pilapil v. Immigration and Naturalization Service, 424 F.2d 6, 9 A.L.R. Fed. 915 (10th Cir. 1970).

8 U.S.—Johnson v. Powell, 414 F.2d 1060 (5th Cir. 1969); Morse v. Boswell, 289 F. Supp. 812 (D. Md. 1968), judgment aff'd, 401 F.2d 544 (4th Cir. 1968); Goldstein v. Clifford, 290 F. Supp. 275 (D.N.J. 1968).

N.M.—State ex rel. Charlton v. French, 1940-NMSC-010, 44 N.M. 169, 99 P.2d 715 (1940).

9 U.S.—Seele v. U.S., 133 F.2d 1015 (C.C.A. 8th Cir. 1943); U.S. v. Niles, 122 F. Supp. 382 (N.D. Cal. 1954), judgment aff'd, 220 F.2d 278 (9th Cir. 1955); U.S. v. Stephens, 245 F. 956 (D. Del. 1917), aff'd, 247 U.S. 504, 38 S. Ct. 579, 62 L. Ed. 1239 (1918).

10 U.S.—Arver v. U.S., 245 U.S. 366, 38 S. Ct. 159, 62 L. Ed. 349 (1918); Dingman v. U.S., 156 F.2d 148 (C.C.A. 9th Cir. 1946).

11 U.S.—U.S. v. Farinas, 308 F. Supp. 459 (S.D. N.Y. 1969), order aff'd, 448 F.2d 1334 (2d Cir. 1971).

12 Ariz.—Valley Nat. Bank of Phoenix v. Glover, 62 Ariz. 538, 159 P.2d 292 (1945).

**Educational benefits**

U.S.—Fielder v. Cleland, 433 F. Supp. 115 (E.D. Mich. 1977), aff'd, 577 F.2d 740 (6th Cir. 1978).

**Grave markers**

W. Va.—West Virginia Cemetery And Funeral Ass'n v. West Virginia Public Service Com'n, 216 W. Va. 431, 607 S.E.2d 537 (2004).

**National service life insurance**

U.S.—Kapourelos v. U.S., 306 F. Supp. 1034 (E.D. Pa. 1969), judgment aff'd, 446 F.2d 1181 (3d Cir. 1971).

13 U.S.—U.S. v. Green, 654 F.3d 637 (6th Cir. 2011).

14 U.S.—Norman v. U. S., 183 Ct. Cl. 41, 392 F.2d 255 (1968) (disapproved of on other grounds by, Colm v. Kissinger, 406 F. Supp. 1250 (D.D.C. 1975)).

15 U.S.—Edwards v. U.S., 338 U.S. 938, 70 S. Ct. 339, 94 L. Ed. 578 (1950).

**Civilian work**

Provision of selective service law requiring civilian work does not provide for an invalid delegation of powers with respect to conscientious objectors.

U.S.—O'Connor v. U. S., 415 F.2d 1110 (9th Cir. 1969).

16 U.S.—U.S. v. Curtiss-Wright Export Corporation, 299 U.S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936); Samora v. U.S., 406 F.2d 1095 (5th Cir. 1969); U.S. v. Bareno, 50 F. Supp. 520 (D. Md. 1943).

17 U.S.—U.S. v. Rosenberg, 150 F.2d 788 (C.C.A. 2d Cir. 1945).

18 U.S.—U.S. v. Stone, 452 F.2d 42 (8th Cir. 1971).

  

19 U.S.—U.S. v. Gurrola-Garcia, 547 F.2d 1075 (9th Cir. 1976).

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## § 353. Highways and motor vehicles; aviation

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2418, 2430(1) to 2430(5)

**The implementation of legislative enactments regulating highways, motor vehicles, and aviation may be delegated to executive bodies.**

The general rules governing delegation by the legislature to executive officers or bodies have been applied with respect to power over highways, and other modes and systems of transportation,[1] and bridges.[2]

While the legislature cannot delegate law-making power to a highway authority[3] or other executive agency,[4] it may prescribe general regulations governing motor vehicles and delegate to an executive agency power to make rules and regulations as to administrative matters.[5] These rules have been applied to various particular matters, including the regulation of motor vehicle traffic,[6] such as with respect to speed;[7] the determination of blood alcohol content;[8] safety standards;[9] motorcyclists' headgear[10]

  

and other safety equipment such as brake lights;[11] the registration of vehicles or the licensing of drivers;[12] proof of financial responsibility;[13] junkyard licenses[14] and records;[15] odometer disclosure;[16] and motor vehicles for hire.[17]

***Aviation.***

The constitutionality of legislative delegation of authority to executive bodies to regulate aviation has been adjudicated.[18]



Footnotes

1 Ga.—Department of Transp. v. Del-Cook Timber Co., Inc., 248 Ga. 734, 285 S.E.2d 913 (1982).
Ill.—Continental Illinois Nat. Bank & Trust Co. of Chicago v. Illinois State Toll Highway Commission, 42 Ill. 2d 385, 251 N.E.2d 253 (1969).
Okla.—Application of Oklahoma Turnpike Authority, 1989 OK 21, 770 P.2d 16 (Okla. 1989).
**Contractor's performance bond**
Ariz.—Wells-Stewart Const. Co. v. Martin Marietta Corp., 103 Ariz. 375, 442 P.2d 119 (1968).
**Outdoor advertising**
Colo.—Orsinger Outdoor Advertising, Inc. v. Department of Highways of State of Colo., 752 P.2d 55 (Colo. 1988).
Ky.—Diemer v. Com., Transp. Cabinet, Dept. of Highways, 786 S.W.2d 861 (Ky. 1990).
Me.—State v. National Advertising Co., 409 A.2d 1277 (Me. 1979).
**Railroads**
Mass.—Opinion of the Justices to the Senate, 422 Mass. 1201, 660 N.E.2d 652 (1996).
Tex.—Railroad Com'n of Texas v. Lone Star Gas Co., a Div. of Enserch Corp., 844 S.W.2d 679 (Tex. 1992).
**Reservation of rights-of-way**
Ill.—Davis v. Brown, 221 Ill. 2d 435, 303 Ill. Dec. 773, 851 N.E.2d 1198 (2006).

2 Conn.—Appeal of Connecticut Co., 89 Conn. 528, 94 A. 992 (1915).
Fla.—Miami Bridge Co. v. Railroad Com'n, 155 Fla. 366, 20 So. 2d 356 (1944).
Wash.—State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp., 142 Wash. 2d 328, 12 P.3d 134 (2000).

3 Ill.—Rosemont Bldg. Supply, Inc. v. Illinois Highway Trust Authority, 45 Ill. 2d 243, 258 N.E.2d 569 (1970).
Iowa—Frost v. State, 172 N.W.2d 575 (Iowa 1969).
S.D.—Hogen v. South Dakota State Bd. of Transp., 245 N.W.2d 493 (S.D. 1976).
**Highway advertising**
Ill.—City of Chicago v. Pennsylvania R. Co., 41 Ill. 2d 245, 242 N.E.2d 152 (1968).

4 Ill.—Bode v. Barrett, 412 Ill. 204, 106 N.E.2d 521 (1952), judgment aff'd, 344 U.S. 583, 73 S. Ct. 468, 97 L. Ed. 567 (1953).
Ind.—Snyder v. State, 206 Ind. 202, 188 N.E. 777 (1934).
Iowa—Goodlove v. Logan, 217 Iowa 98, 251 N.W. 39 (1933).

5 Ark.—Terrell v. Loomis, 218 Ark. 296, 235 S.W.2d 961 (1951).
Idaho—State v. Heitz, 72 Idaho 107, 238 P.2d 439 (1951).
Tex.—Gillaspie v. Department of Public Safety, 152 Tex. 459, 259 S.W.2d 177 (1953).

6 U.S.—Sproles v. Binford, 286 U.S. 374, 52 S. Ct. 581, 76 L. Ed. 1167 (1932).
Mont.—Montana State University v. Ransier, 167 Mont. 149, 536 P.2d 187 (1975).
Pa.—Com. v. Cherney, 454 Pa. 285, 312 A.2d 38 (1973).
**Tolls and user fees**
Mass.—Murphy v. Massachusetts Turnpike Authority, 462 Mass. 701, 971 N.E.2d 231 (2012).
Va.—Elizabeth River Crossings OpCo, LLC v. Meeks, 286 Va. 286, 749 S.E.2d 176 (2013).

7 Colo.—People v. Peterson, 734 P.2d 118 (Colo. 1987).
Mont.—Lee v. State, 195 Mont. 1, 635 P.2d 1282 (1981).
Or.—Bercot v. Oregon Transp. Commission, 31 Or. App. 449, 570 P.2d 1195 (1977).
**Limited speed capability**

Mass.—Opinion of the Justices to the House of Representatives, 368 Mass. 824, 333 N.E.2d 385 (1975).

8 Fla.—State v. Bender, 382 So. 2d 697 (Fla. 1980).
Iowa—State v. Berch, 222 N.W.2d 741 (Iowa 1974).
S.D.—State v. Heinrich, 449 N.W.2d 25 (S.D. 1989).

9 U.S.—Rex Chainbelt, Inc. v. Volpe, 486 F.2d 757 (7th Cir. 1973).
Iowa—State v. Rivera, 260 Iowa 320, 149 N.W.2d 127 (1967).

10 Fla.—State v. Eitel, 227 So. 2d 489 (Fla. 1969).
Neb.—Robotham v. State, 241 Neb. 379, 488 N.W.2d 533 (1992).
N.Y.—People v. Newhouse, 55 Misc. 2d 1064, 287 N.Y.S.2d 713 (N.Y. City Ct. 1968).

11 Me.—State v. Webber, 2000 ME 168, 759 A.2d 724 (Me. 2000).

12 Cal.—Escobedo v. State Dept. of Motor Vehicles, 35 Cal. 2d 870, 222 P.2d 1 (1950) (overruled on other grounds by, Rios v. Cozens, 7 Cal. 3d 792, 103 Cal. Rptr. 299, 499 P.2d 979 (1972)).
Colo.—Elizondo v. State, Dept. of Revenue, Motor Vehicle Division, 194 Colo. 113, 570 P.2d 518 (1977).
Wyo.—Spiegelberg v. Wyoming Highway Dept., 508 P.2d 18 (Wyo. 1973).

**Revocation or suspension for driving while intoxicated**

Cal.—Nicolino v. Cozens, 33 Cal. App. 3d 1024, 109 Cal. Rptr. 498 (1st Dist. 1973).
Mo.—Smith v. Spradling, 536 S.W.2d 776 (Mo. Ct. App. 1976).

13 Ohio—City of South Euclid v. Jemison, 28 Ohio St. 3d 157, 503 N.E.2d 136 (1986).

14 R.I.—Bourque v. Dettore, 589 A.2d 815 (R.I. 1991).

15 Fla.—Reynolds v. State, 383 So. 2d 228 (Fla. 1980).

16 U.S.—Leslie v. George Thompson Ford, Inc., 484 F. Supp. 954 (N.D. Ga. 1979).

17 N.Y.—Greater New York Taxi Ass'n v. New York City Taxi and Limousine Com'n, 121 A.D.3d 21, 988 N.Y.S.2d 5 (1st Dep't 2014).
Ohio—Matz v. J.L. Curtis Cartage Co., 132 Ohio St. 271, 8 Ohio Op. 41, 7 N.E.2d 220 (1937).
Wis.—Interstate Trucking Co. v. Dammann, 208 Wis. 116, 241 N.W. 625, 82 A.L.R. 1080 (1932).

18 U.S.—Perko v. U.S., 204 F.2d 446 (8th Cir. 1953); Colonial Airlines v. Adams, 87 F. Supp. 242 (D. D.C. 1949).
Mass.—Com. v. Diaz, 326 Mass. 525, 95 N.E.2d 666 (1950).
W. Va.—Meisel v. Tri-State Airport Authority, 135 W. Va. 528, 64 S.E.2d 32 (1951).

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## § 354. Public health, safety, and welfare

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2422(1) to 2422(3), 2427(1), 2431

**The general rules governing the delegation of authority to executive officers and bodies have been applied with respect to the administration of statutes for the protection of the public health, safety, and welfare.**

The general rules concerning the delegation of authority to executive officers and bodies by the legislature have been applied to matters involving the public health, safety, and welfare,[1] such as burial of the dead;[2] fire prevention;[3] housing and mortgages;[4] building regulations and zoning and land planning;[5] gun control;[6] sex offender registration and notification;[7] and public assistance or Social Security benefits,[8] including Medicaid and Medicare or state medical assistance benefits programs[9] and welfare fraud.[10]

The general rules relating to delegation of power to the executive branch has also been considered in connection with the designation and control of dangerous drugs and controlled substances.[11]

  

Footnotes

1 U.S.—U.S. v. Shreveport Grain & Elevator Co., 287 U.S. 77, 53 S. Ct. 42, 77 L. Ed. 175 (1932); Upholstered Furniture Action Council v. California Bureau of Home Furnishings, 442 F. Supp. 565 (E.D. Cal. 1977).
Ga.—Albany Surgical, P.C. v. Georgia Dept. of Community Health, 278 Ga. 366, 602 S.E.2d 648 (2004).
Mich.—Blue Cross and Blue Shield of Michigan v. Milliken, 422 Mich. 1, 367 N.W.2d 1 (1985).
N.Y.—Boreali v. Axelrod, 71 N.Y.2d 1, 523 N.Y.S.2d 464, 517 N.E.2d 1350 (1987).
W. Va.—State ex rel. Barker v. Manchin, 167 W. Va. 155, 279 S.E.2d 622 (1981).
**Police power**
Where the subject matter of the administrative authority is public health, the power originates from the police power, not the constitution.
W. Va.—Foundation For Independent Living, Inc. v. The Cabell-Huntington Bd. of Health, 214 W. Va. 818, 591 S.E.2d 744 (2003).
**Wide latitude**
(1) Widest latitude must be given to delegations of legislative authority to administrative agencies which are designed to protect public health.
Md.—Department of Transp. v. Armacost, 311 Md. 64, 532 A.2d 1056 (1987).
(2) An agency's delegated authority from the legislature is particularly broad where the agency is concerned with public health and welfare.
N.J.—Guaman v. Velez, 421 N.J. Super. 239, 23 A.3d 451 (App. Div. 2011), subsequent determination, 432 N.J. Super. 230, 74 A.3d 931 (App. Div. 2013), appeal pending, (Apr. 25, 2014) and judgment aff'd, 221 N.J. 213, 110 A.3d 927 (2015).
(3) Requirement of expressed standards in statute delegating power to agency may be relaxed when discretion to be exercised relates to or regulates for protection of public's health, safety, and welfare.
Tenn.—Bean v. McWherter, 953 S.W.2d 197 (Tenn. 1997).

2 Vt.—State v. Chambers, 144 Vt. 234, 477 A.2d 110 (1984).

3 Ga.—Tempo Management, Inc. v. DeKalb County, 258 Ga. 713, 373 S.E.2d 622 (1988).

4 U.S.—Grymes Hill Manor Estates v. U. S., 179 Ct. Cl. 466, 373 F.2d 920 (1967).
D.C.—Mudd v. District of Columbia Rental Housing Com'n, 546 A.2d 440 (D.C. 1988).
Ind.—Steup v. Indiana Housing Finance Authority, 273 Ind. 72, 402 N.E.2d 1215 (1980).

5 Fla.—State v. Roberts, 419 So. 2d 1164 (Fla. 2d DCA 1982), dismissed, 426 So. 2d 28 (Fla. 1983).
Vt.—In re Handy, 171 Vt. 336, 764 A.2d 1226 (2000).
Va.—Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 594 S.E.2d 571 (2004).

6 N.J.—Burton v. Sills, 53 N.J. 86, 248 A.2d 521, 28 A.L.R.3d 829 (1968).
R.I.—State v. Storms, 112 R.I. 121, 308 A.2d 463 (1973).

7 U.S.—U.S. v. Cooper, 750 F.3d 263 (3d Cir. 2014), petition for certiorari filed, 135 S. Ct. 209, 190 L. Ed. 2d 160 (2014); U.S. v. Ambert, 561 F.3d 1202 (11th Cir. 2009).
**Proper delegation of authority**
Sex Offender Registration and Notification Act (SORNA) provision giving the Attorney General authority to determine SORNA's retroactive application was not an improper delegation of legislative authority; Congress unambiguously delineated its general policy, the public agency which is to apply it, and the boundaries of the delegated authority.
U.S.—U.S. v. Nichols, 775 F.3d 1225 (10th Cir. 2014); U.S. v. Ambert, 561 F.3d 1202 (11th Cir. 2009).

8 U.S.—Bennett v. Cohen, 297 F. Supp. 767 (W.D. N.C. 1969).
Mass.—Opinion of the Justices to the House of Representatives, 368 Mass. 831, 333 N.E.2d 388 (1975).
N.J.—Motyka v. McCorkle, 58 N.J. 165, 276 A.2d 129 (1971).

9 U.S.—California Welfare Rights Organization v. Richardson, 348 F. Supp. 491 (N.D. Cal. 1972); Pharmacist Political Action Committee of Maryland (PHARMPAC) v. Harris, 502 F. Supp. 1235 (D. Md. 1980).

N.J.—Guaman v. Velez, 421 N.J. Super. 239, 23 A.3d 451 (App. Div. 2011), subsequent determination, 432 N.J. Super. 230, 74 A.3d 931 (App. Div. 2013), appeal pending, (Apr. 25, 2014) and judgment aff'd, 221 N.J. 213, 110 A.3d 927 (2015).

**Eligibility for medical assistance benefits**

Neb.—Clemens v. Harvey, 247 Neb. 77, 525 N.W.2d 185 (1994).

10 Fla.—Sanicola v. State, 384 So. 2d 152 (Fla. 1980).

11 § 349.

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## Research References

**A.L.R. Library**

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A.L.R. Index, Separation of Powers
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West's A.L.R. Digest, District and Prosecuting Attorneys 8(4), 8(5), 8(6), 8(8)



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## § 447. Nature and scope of executive power

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2620, 2626

**The core power of the executive branch is to implement or enforce legislative policies as embodied in enacted legislation or as declared by the legislature.**

The core power of the executive branch is to implement or carry out legislative policies[1] as embodied in enacted legislation[2] or as declared by the legislature.[3] Therefore, the executive power is a policy execution power.[4]

In the federal realm, the power to make necessary laws is in Congress while the power to execute them is in the President.[5] Criminal prosecution is a core function of the federal executive branch, and this responsibility includes the authority to investigate and litigate offenses against the United States.[6]

The executive power essentially implements laws already in existence[7] although, in performing this function, executive officers may exercise some discretion,[8] and all constitutional acts of power by the executive department have as much validity as if

they proceeded from the legislative department.[9] Executive discretion in the enforcement of laws may apply to both criminal as well as civil matters.[10]

It is the right of executive officers named in the constitution to exercise all the powers properly belonging to the executive department.[11] For example, spending funds,[12] or administering appropriated funds,[13] is an executive power although the executive branch may be precluded from exercising any control over the expenditure of appropriated money in a manner that would affect the legislature's choice of purpose.[14]

Not every state's constitution defines expressly which powers are executive.[15] However, those powers that are conferred upon state officials are generally held to be exclusive, and except in the manner authorized by the constitution, these powers cannot be enlarged or restricted.[16]

Except as empowered by the constitution, executive officers may not act without legislative authority or beyond the limits established by the legislature.[17] Thus, the authority of executive officers to make regulations to enforce a statute is limited to the making of regulations which are within the scope of the power granted[18] and which are reasonable.[19] Expediency does not grant powers to the executive branch which the state constitution has denied.[20]

The adoption of administrative regulations necessary to implement and carry out the purpose of legislative enactments is executive in nature and is ordinarily within the constitutional purview of the executive branch of government.[21] For the constitutional framework to operate as intended, a new governor must possess the power to manage the bureaucracy or administrative agencies and to influence those agencies' rulemaking decisions through his or her appointments and directives.[22]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Under constitutional separation of powers, the entire executive power that is vested in a President, who must take care that the laws be faithfully executed, belongs to the President alone, but because it would be impossible for one person to perform all the great business of the state, the Constitution assumes that lesser executive officers will assist the President in discharging the duties of his trust, but these lesser officers must remain accountable to the President, whose authority they wield. U.S. Const. art. 2, § 1, cl. 1; U.S. Const. Art. 2, § 3. Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183, 207 L. Ed. 2d 494 (2020).

National-security policy is the prerogative of the Congress and President. U.S.C.A. Const. Art. 1, § 8; U.S.C.A. Const. Art. 2, §§ 1, 2. Ziglar v. Abbasi, 2017 WL 2621317 (U.S. 2017).

There are limitations on the power of the Executive under Article II of the Constitution and in the powers authorized by congressional enactments, even with respect to matters of national security. U.S.C.A. Const. Art. 2, § 1 et seq. Ziglar v. Abbasi, 2017 WL 2621317 (U.S. 2017).

**[END OF SUPPLEMENT]**



Footnotes

1 N.Y.—Bourquin v. Cuomo, 85 N.Y.2d 781, 628 N.Y.S.2d 618, 652 N.E.2d 171 (1995).

2 Ala.—Opinion of the Justices, 892 So. 2d 332 (Ala. 2004).
Iowa—In Interest of C.S., 516 N.W.2d 851 (Iowa 1994).
Nev.—N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs, 310 P.3d 583, 129 Nev. Adv. Op. No. 72 (Nev. 2013).

3 Ariz.—State ex rel. Woods v. Block, 189 Ariz. 269, 942 P.2d 428 (1997).

4 Utah—Carter v. Lehi City, 2012 UT 2, 269 P.3d 141 (Utah 2012).

5 U.S.—Medellin v. Texas, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

6 U.S.—In re Jackson, 51 A.3d 529 (D.C. 2012).

7 Utah—Carter v. Lehi City, 2012 UT 2, 269 P.3d 141 (Utah 2012).

8 U.S.—Delay v. U.S., 602 F.2d 173 (8th Cir. 1979).
Ala.—Opinion of the Justices, 892 So. 2d 332 (Ala. 2004).

9 U.S.—U.S. v. Pink, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942).
N.Y.—In re Deyo's Estate, 180 Misc. 32, 42 N.Y.S.2d 379 (Sur. Ct. 1943).

10 N.H.—In re Opinion Of Justices, 162 N.H. 160, 27 A.3d 859 (2011).

11 U.S.—U.S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); Cox v. Hauberg, 381 U.S. 935, 85 S. Ct. 1767, 14 L. Ed. 2d 700 (1965); Committee for Consideration of Jones Falls Sewage System v. Train, 387 F. Supp. 526 (D. Md. 1975).
Ill.—People v. Vaughn, 49 Ill. App. 3d 37, 6 Ill. Dec. 932, 363 N.E.2d 879 (5th Dist. 1977).
Mass.—Opinion of the Justices to the Senate, 375 Mass. 827, 376 N.E.2d 1217 (1978).
**Emergency powers**
"Emergency" executive power can be unconstitutional usurpation of legislative authority either when executive acts contrary to expressed or implied will of legislature or when legislature has failed to act.
N.J.—Worthington v. Fauver, 88 N.J. 183, 440 A.2d 1128 (1982).

12 Vt.—Hunter v. State, 177 Vt. 339, 2004 VT 108, 865 A.2d 381 (2004).

13 Colo.—In re Interrogatories Submitted by General Assembly on House Bill 04-1098, 88 P.3d 1196 (Colo. 2004).

14 N.M.—State ex rel. Schwartz v. Johnson, 1995-NMSC-080, 120 N.M. 820, 907 P.2d 1001 (1995).
As to the spending of public funds as an encroachment on the legislative power, see § 454.

15 Ill.—Administrative Office of Illinois Courts v. State and Mun. Teamsters, Chauffeurs and Helpers Union, Local 726, 167 Ill. 2d 180, 212 Ill. Dec. 627, 657 N.E.2d 972 (1995).

16 Tex.—Perry v. Del Rio, 67 S.W.3d 85 (Tex. 2001).

17 N.H.—Opinion of the Justices, 118 N.H. 582, 392 A.2d 125 (1978).
W. Va.—State ex rel. West Virginia Bd. of Ed. v. Miller, 153 W. Va. 414, 168 S.E.2d 820 (1969).

18 Conn.—Loglisci v. Liquor Control Com'n, 123 Conn. 31, 192 A. 260 (1937).
Wash.—State v. Miles, 5 Wash. 2d 322, 105 P.2d 51 (1940).

19 Conn.—Loglisci v. Liquor Control Com'n, 123 Conn. 31, 192 A. 260 (1937).

20 Kan.—State ex rel. Stephan v. Finney, 251 Kan. 559, 836 P.2d 1169 (1992).

21 Ky.—Legislative Research Com'n By and Through Prather v. Brown, 664 S.W.2d 907 (Ky. 1984).

22 Mich.—Michigan Farm Bureau v. Dep't of Environmental Quality, 292 Mich. App. 106, 807 N.W.2d 866 (2011).

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## § 448. Enforcement of laws; criminal prosecutions and executive discretion

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2620, 2626
West's Key Number Digest, District and Prosecuting Attorneys 8(5), 8(6)

**The prosecution of crime is an executive function, and prosecutors have discretion in the prosecution of defendants.**

The prosecution of crime is an executive function,[1] the duty of the executive department being to enforce the criminal laws.[2] Actions to enforce the law are within the special province of the executive branch[3] as is a decision on whether or not to prosecute a particular defendant,[4] what cases to prosecute,[5] the decision as to which charges to file,[6] and when and to whom immunity from prosecution will be granted.[7] Executive discretion in the enforcement of state laws may apply to both criminal actions as well as civil actions.[8] In a noncriminal matter, for example, the executive branch possesses the discretionary authority to decide whether to file dependency petitions.[9]

Deciding whether to plea bargain with a criminal defendant is a function delegated to the executive branch[10] as is the power to decide what evidence of aggravating circumstances to offer at sentencing.[11] The executive branch similarly retains the power to move to vacate a conviction, in addition to dismissing an indictment.[12]

  

A decision on seeking the death penalty is a prosecutorial function,[13] and the execution of capital punishment is an executive function.[14]



Footnotes

1 Ky.—Flynt v. Com., 105 S.W.3d 415 (Ky. 2003).
Minn.—Johnson v. State, 641 N.W.2d 912 (Minn. 2002).

2 Ky.—Flynt v. Com., 105 S.W.3d 415 (Ky. 2003).

3 N.H.—In re Opinion Of Justices, 162 N.H. 160, 27 A.3d 859 (2011).

4 U.S.—U.S. ex rel. Reagan v. East Texas Medical Center Regional Healthcare System, 274 F. Supp. 2d 824 (S.D. Tex. 2003), aff'd, 384 F.3d 168 (5th Cir. 2004).
Cal.—Manduley v. Superior Court, 27 Cal. 4th 537, 27 Cal. 4th 887a, 117 Cal. Rptr. 2d 168, 41 P.3d 3 (2002), as modified, (Apr. 17, 2002).
Mass.—Com. v. Clerk-Magistrate of West Roxbury Div. of Dist. Court, 439 Mass. 352, 787 N.E.2d 1032 (2003).
**Prosecutorial discretion is rooted in the separation of powers and due process**
Cal.—Gananian v. Wagstaffe, 199 Cal. App. 4th 1532, 132 Cal. Rptr. 3d 487, 273 Ed. Law Rep. 346 (1st Dist. 2011).

5 Minn.—State v. Zais, 790 N.W.2d 853 (Minn. Ct. App. 2010), aff'd, 805 N.W.2d 32 (Minn. 2011).

6 Cal.—Manduley v. Superior Court, 27 Cal. 4th 537, 27 Cal. 4th 887a, 117 Cal. Rptr. 2d 168, 41 P.3d 3 (2002), as modified, (Apr. 17, 2002).
Minn.—Johnson v. State, 641 N.W.2d 912 (Minn. 2002).
S.C.—State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999).

7 Pa.—Com. v. Doolin, 2011 PA Super 133, 24 A.3d 998 (2011).

8 N.H.—In re Opinion Of Justices, 162 N.H. 160, 27 A.3d 859 (2011).

9 Cal.—In re M.C., 199 Cal. App. 4th 784, 131 Cal. Rptr. 3d 194 (1st Dist. 2011).

10 Wash.—State v. Rice, 159 Wash. App. 545, 246 P.3d 234, 264 Ed. Law Rep. 400 (Div. 2 2011), aff'd on other grounds, 174 Wash. 2d 884, 279 P.3d 849 (2012).

11 Ariz.—State v. Prentiss, 163 Ariz. 81, 786 P.2d 932 (1989).

12 U.S.—U.S. v. McIntosh, 704 F.3d 894 (11th Cir. 2013), cert. denied, 134 S. Ct. 470, 187 L. Ed. 2d 316 (2013).

13 Miss.—Moody v. State, 716 So. 2d 592 (Miss. 1998).

14 Fla.—Goode v. Wainwright, 448 So. 2d 999 (Fla. 1984).
As to prosecution, parole, and probation as functions of the executive as opposed to the judicial branch, see § 463.

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## § 449. Administrative officers and agencies

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2620, 2621, 2626

**Administrative officers and agencies of the government are, as a rule, a part of the executive department.**

An "agency" is a state entity empowered to affect an individual's legal rights or duties in a specific area of law or governmental administration.[1] Administrative officers and agencies of the government belong, as a rule, to the executive department,[2] although the word "administrative" has been held not to be synonymous with "executive" but to be synonymous with "ministerial."[3] Though usually considered a part of the executive branch,[4] the powers exercised by an administrative agency, to the extent that such powers are delegated to it by the legislature, are actually legislative in nature.[5]

The constitutional doctrine of separation of powers mandates that agencies act only within the scope of their delegated authority.[6] Such agencies cannot exercise executive powers specifically delegated to a governor,[7] and even where a governmental branch has properly delegated its authority to an agency, the authority delegated binds the agency which can only exercise the authority that has been retained.[8]

  

Ministerial functions are inherent and incidental powers of the executive department and are methods of implementation to accomplish or put into effect basic function of such department.[9] The separation of powers doctrine directs administrative agencies to their duty of implementing legislation[10] or the legislature's policy decisions.[11]

In general, executive officers may delegate authority to administrative agencies or officials.[12] On the other hand, executive obligations may not be transferred to the judicial and legislative branches of government.[13] Moreover, executive powers may not be delegated to private or irresponsible persons[14] although delegations to private parties are not invalid when the delegating agency or official retains final reviewing authority.[15]



Footnotes

1 Idaho—Williams v. Idaho State Bd. of Real Estate Appraisers, 157 Idaho 496, 337 P.3d 655 (2014).

2 Kan.—Republic Natural Gas Co. v. Axe, 197 Kan. 91, 415 P.2d 406 (1966).

**Teachers**

Teacher, when engaged in disseminating state standards of educational excellence, is exercising function of executive department.

Conn.—Stolberg v. Caldwell, 175 Conn. 586, 402 A.2d 763 (1978).

3 Ind.—Tucker v. State, 218 Ind. 614, 35 N.E.2d 270 (1941).

4 Kan.—Republic Natural Gas Co. v. Axe, 197 Kan. 91, 415 P.2d 406 (1966).

5 Wis.—Clintonville Transfer Line v. Public Service Commission, 248 Wis. 59, 21 N.W.2d 5 (1945).

6 Colo.—Hawes v. Colorado Div. of Ins., 65 P.3d 1008 (Colo. 2003).

7 Ind.—Tucker v. State, 218 Ind. 614, 35 N.E.2d 270 (1941).

8 Iowa—Warren County Bd. of Health v. Warren County Bd. of Supervisors, 654 N.W.2d 910 (Iowa 2002).

9 Nev.—Galloway v. Truesdell, 83 Nev. 13, 422 P.2d 237 (1967).

10 N.M.—City of Albuquerque v. New Mexico Public Regulation Com'n, 2003-NMSC-028, 134 N.M. 472, 79 P.3d 297 (2003).

11 N.Y.—Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 766 N.Y.S.2d 654, 798 N.E.2d 1047 (2003).

12 U.S.—United Black Fund, Inc. v. Hampton, 352 F. Supp. 898 (D.D.C. 1972).

Pa.—Pennsylvania Retailers' Associations, Reliable, Inc. v. Lazin, 57 Pa. Commw. 232, 426 A.2d 712 (1981).

13 W. Va.—Facilities Review Panel v. Coe, 187 W. Va. 541, 420 S.E.2d 532 (1992).

14 Cal.—People v. Shults, 87 Cal. App. 3d 101, 150 Cal. Rptr. 747 (1st Dist. 1978).

15 U.S.—United Black Fund, Inc. v. Hampton, 352 F. Supp. 898 (D.D.C. 1972).

La.—Louisiana Teachers' Ass'n v. Orleans Parish School Bd., 303 So. 2d 564 (La. Ct. App. 4th Cir. 1974), writ denied, 305 So. 2d 541 (La. 1975).

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## § 450. Presidential and gubernatorial power

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2620 to 2626

**The executive power in the federal government is vested in the President, who, except as other powers are vested in him or her by Congress, has only such powers as are conferred on him or her by the Constitution.**

The executive power in the federal government is vested in the President.[1] Under the federal system, Congress is to make laws and the President, acting at times through agencies, is to faithfully execute them.[2] As such, the President cannot delegate the ultimate responsibility or the active obligation to supervise the actions of the executive branch.[3]

Except for any other powers vested in the President by Congress, the President has only such powers as are conferred by the Constitution.[4] Generally, the powers of the President are restricted to recommending laws thought wise, vetoing laws considered bad, and seeing to the faithful execution of laws properly enacted.[5] Although the President's power of executing the laws includes both the authority and responsibility to resolve some questions left open by Congress, it does not include a power to revise clear statutory terms.[6]

  

***Governor.***

The governor of a state bears a relation to the state similar to that which the President bears to the United States.[7] As an executive officer, a governor is forbidden to exercise any legislative power or function except as the state's constitution expressly provides.[8] While a governor lacks the authority to change or amend state law since such power falls exclusively to the legislative branch,[9] each new governor must necessarily possess the power and ability to manage the administrative agencies and to influence those agencies' rulemaking decisions through his or her appointments and directives.[10]

When a state constitution gives a power to the governor and only to the governor, only the governor may act,[11] and when a state legislature has placed a function, power, or duty in one branch, there is no authority in the governor to move it elsewhere unless the legislature provides the governor that authority.[12]

**CUMULATIVE SUPPLEMENT**

**Cases:**

The President cannot delegate ultimate responsibility to lesser executive officers or delegate the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch. U.S. Const. art. 2, § 1, cl. 1; U.S. Const. Art. 2, § 3. Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020).

**[END OF SUPPLEMENT]**



Footnotes

1 U.S.—State of Mississippi v. Johnson, 71 U.S. 475, 18 L. Ed. 437, 1866 WL 9457 (1866).

2 U.S.—Utility Air Regulatory Group v. E.P.A., 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014); Medellin v. Texas, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

3 U.S.—Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010).

4 U.S.—Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio L. Abs. 417, 62 Ohio L. Abs. 473, 26 A.L.R.2d 1378 (1952).
**Power to wage war as constitutionally denied to President**
U.S.—Orlando v. Laird, 317 F. Supp. 1013 (E.D. N.Y. 1970), judgment aff'd, 443 F.2d 1039 (2d Cir. 1971).

5 U.S.—Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio L. Abs. 417, 62 Ohio L. Abs. 473, 26 A.L.R.2d 1378 (1952).

6 U.S.—Utility Air Regulatory Group v. E.P.A., 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014).

7 Ala.—Morgan County Commission v. Powell, 292 Ala. 300, 293 So. 2d 830 (1974).

8 Cal.—St. John's Well Child and Family Center v. Schwarzenegger, 50 Cal. 4th 960, 116 Cal. Rptr. 3d 195, 239 P.3d 651 (2010).

9 Fla.—Florida House of Representatives v. Crist, 999 So. 2d 601 (Fla. 2008).

10 Mich.—Michigan Farm Bureau v. Dep't of Environmental Quality, 292 Mich. App. 106, 807 N.W.2d 866 (2011).

11 Ariz.—McDonald v. Thomas, 202 Ariz. 35, 40 P.3d 819 (2002).

12 Ky.—Brown v. Barkley, 628 S.W.2d 616 (Ky. 1982).

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## § 451. Appointment of officers

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2620, 2626

**Generally, the power to appoint to office is intrinsically executive in nature, although executive officers do not have exclusive power to appoint to office, and, unless forbidden by the constitution, such power may be vested by statute in the legislature or the courts.**

The power to appoint to an office is intrinsic among the powers of the executive[1] and is included in any general grant of power to the executive branch of government.[2] The power to appoint is not a legislative[3] or a judicial[4] function. For the constitutional framework to operate properly, a new governor must possess the power to influence the administrative agencies' rulemaking decisions by way of his or her appointments.[5] Unless properly authorized, executive officers may not delegate their power to make appointments.[6]

Nonetheless, the power to appoint to an office is not exclusively an executive function,[7] at least not so exclusively an executive function that it may not be exercised by the legislature[8] or by the courts[9] as an incident to the discharge of functions properly

within their respective spheres. Unless forbidden by the constitution, such power may be vested by statute either in the legislature or in the courts.[10]



Footnotes

1 Mass.—Commissioner of Administration v. Kelley, 350 Mass. 501, 215 N.E.2d 653 (1966).
**Class of eligibles**
Pursuant to its power to set qualifications, Congress may prescribe that appointee to federal office be selected from among those found to be most qualified by competitive examination, but within class of eligibles, President may exercise the power of appointment.
U.S.—Mow Sun Wong v. Hampton, 435 F. Supp. 37 (N.D. Cal. 1977), decision aff'd, 626 F.2d 739 (9th Cir. 1980).

2 U.S.—Municipality of St Thomas & St John v. Gordon, 2 V.I. 107, 78 F. Supp. 440 (D.V.I. 1948).
Miss.—Alexander v. State By and Through Allain, 441 So. 2d 1329 (Miss. 1983).

3 La.—State ex rel. Porterie v. Smith, 184 La. 263, 166 So. 72 (1935).

4 Mass.—Clark v. City Council of Waltham, 328 Mass. 40, 101 N.E.2d 369 (1951).

5 Mich.—Michigan Farm Bureau v. Dep't of Environmental Quality, 292 Mich. App. 106, 807 N.W.2d 866 (2011).

6 N.H.—In re Opinion of the Justices, 88 N.H. 484, 190 A. 425 (1937).

7 Kan.—Sedlak v. Dick, 256 Kan. 779, 887 P.2d 1119 (1995).
Okla.—In re Application of Oklahoma Dept. of Transp., 2003 OK 105, 82 P.3d 1000 (Okla. 2003).

8 § 324.

9 § 444.

10 S.C.—Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 114 A.L.R. 1130 (1935).

# 16 C.J.S. Constitutional Law § 452

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**Constitutional Law**
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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**D. Executive Powers and Functions**

**1. In General**

## § 452. Removal of officers

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2620, 2626

**The executive's power to remove officers should not necessarily be implied from the executive's power to appoint officers.**

The power to remove from office is not necessarily a part of the inherent power of the governor or other executive officer.[1] In the absence of authority in the constitution, the legislature cannot empower executive officers to remove officials whose offices are created by the constitution.[2] On the other hand, in the case of offices created by the legislature, the power of removal may be vested by statute in the governor[3] or in some other officer or department of the government;[4] the exercise thereof may be made conclusive on the courts.[5]

The President has power to remove an officer appointed by him or her as an incident to the power of appointment or under the constitutional grant of authority to the President or both, in the absence of legislative limitation, regardless of whether such officer is engaged in the exercise of quasi-legislative or quasi-judicial functions.[6]

Footnotes

1 Me.—Sawyer v. Gilmore, 109 Me. 169, 83 A. 673 (1912).

2 Neb.—Laverty v. Cochran, 132 Neb. 118, 271 N.W. 354 (1937).

3 Me.—Opinion of the Justices of Supreme Judicial Court Given Under the Provisions of Section 3 of Article VI of the Constitution, 343 A.2d 196 (Me. 1975).

N.C.—James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979).

**Local boards of education**

A statute governing the suspension and removal of members of local boards of education, which ultimately vested the power of suspension and removal in the governor, did not violate the constitutional separation of powers; the executive branch of government is constitutionally authorized to carry laws into effect including laws that regulate official conduct.

Ga.—DeKalb County School Dist. v. Georgia State Bd. of Educ., 294 Ga. 349, 751 S.E.2d 827, 300 Ed. Law Rep. 562 (2013).

4 Me.—Opinion of the Justices of Supreme Judicial Court Given Under the Provisions of Section 3 of Article VI of the Constitution, 343 A.2d 196 (Me. 1975).

Wis.—State ex rel. Brister v. Weston, 241 Wis. 584, 6 N.W.2d 648 (1942).

5 N.Y.—In re Skinkle, 249 N.Y. 172, 163 N.E. 297 (1928).

6 U.S.—Morgan v. Tennessee Valley Authority, 28 F. Supp. 732 (E.D. Tenn. 1939), judgment aff'd, 115 F.2d 990 (C.C.A. 6th Cir. 1940).

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**D. Executive Powers and Functions**

**2. Encroachment on Legislature**

## § 453. Executive interference with legislative authority, generally

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2621

**Public policy is for the determination of the legislative, not the executive, branch of government, and executive officers may not ordinarily exercise, question, interfere with, or limit powers conferred on the legislature by the constitution. However, they may make rules carrying out the provisions or expressed purpose of statutes or disregard statutes properly declared invalid.**

Under the separation of powers doctrine, unless the constitution expressly grants an enumerated legislative power to the executive, the executive does not have the power to perform a legislative function.[1] State constitutions generally divide the powers between the government branches so as to grant the legislature the power to enact laws, the executive branch the power to carry out and enforce those laws, and the judicial branch the authority to hear and determine justiciable controversies.[2] The determination of public policy is within the province of the legislative branch of government, and the executive branch may only apply those policies, and may not itself determine matters of public policy,[3] or substitute its own policy for that of the legislature.[4] Executive decisions usually involve case-specific considerations, not policy-based declarations of rules[5] as

  

executive powers are policy execution powers.[6] While the executive branch generally has the power and authority to control litigation, it cannot exercise this power in order to prevent the execution of a law.[7]

It is beyond the power of executive or administrative officers or bodies to exercise, question, interfere with, or limit powers conferred on the legislature by the constitution.[8] However, in order to rise to the level of a constitutional question, conflict between the executive and legislative branches must be clear and at least apparently incapable of resolution, absent judicial intervention.[9]

The power to make laws is a legislative power, and may not be exercised by executive officers or bodies, either by means of rules, regulations, or orders having the force and effect of legislation, or otherwise.[10] A state constitution may also be said to vest ultimate legislative power in the people themselves although their authority does not extend to executive powers.[11] Asserting the State's interest in the validity of a challenged law, however, is not itself an exclusively executive function, and the proponents of state measures or propositions may also rightfully defend a measure's validity.[12]

The power to alter or repeal laws is also a legislative power,[13] and executive officers or administrative bodies may not, by means of construction, rules and regulations, orders, or otherwise, extend, alter, repeal, fail to give effect to, or, ordinarily, set at naught or disregard laws enacted by the legislature.[14] Thus, the law and its execution are separate and distinct spheres, for purposes of the constitutional separation of powers,[15] and lawmaking is not an executive function.[16] An unlawful conflict or infringement occurs when an administrative agency goes beyond the existing statutes or case law it is charged with administering and claims the authority to modify this existing law or to create new law on its own.[17] However, if, in interpreting statutes, an executive branch agency does not add to or detract from the statutes but rather construes them reasonably, it does not impinge on the legislature's power.[18] Amendments of statutes may thus not be made by administrative officers charged with their enforcement since such amendments may only be made by the legislature.[19] Moreover, administrative officials and agencies are empowered to act only in accordance with the standards prescribed by the legislative branch of government.[20] An administrative agency has no powers other than those the legislature has delegated to it, and any excursion by an administrative body beyond its legislative guidelines is treated as a usurpation of constitutional powers vested only in the major branch of government.[21] While an administrative agency has wide discretion when implementing legislation pursuant to statute, it may decide to penalize specific kinds of conduct only when Congress expressly delegated that power to the agency.[22]

In a prosecution for violation of an administrative order, it must clearly appear that the order is one which falls within the scope of the authority conferred on the administrative body.[23] If the legislature has not spoken to grant to the executive the power to take acts enumerated as within the legislative power by the constitution, then the silence must be understood as denying the executive such authority.[24] On the other hand, an executive or administrative agency does not encroach on the constitutional authority of the legislature with respect to a particular subject matter where it exercises with respect to such subject matter administrative powers conferred on it by statute.[25]

The policy or wisdom of a law is for the legislature and not for the executive to determine,[26] and the executive branch is not warranted in departing from the standards set up by a statute because of possible doubts as to the wisdom of the course chosen by the legislature.[27] Executive officers are not, of course, required to observe statutes declared invalid by a competent tribunal.[28] Indeed, an executive branch agency has authority to abrogate a statute which is clearly unconstitutional under a United States Supreme Court decision dealing with a similar law, without having to wait for another court decision specifically declaring the statute unconstitutional.[29]

  

A construction placed on a statute by the executive, especially if long continued, is entitled to weight in the construction of the act by the judiciary.[30] On the other hand, long continuation of administrative practice incompatible with the requirements of the Constitution cannot overcome responsibility to enforce those requirements of the Constitution.[31]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Principles of separation of powers compelled conclusion that Presidential Proclamation indefinitely barring entry by nationals from Iran, Libya, Syria, Yemen, Somalia, and Chad exceeded scope of authority delegated to President under provision of Immigration and Nationality Act governing suspension of entry of any aliens or of any class of aliens into United States based on detriment to United States' interests, strongly suggesting that State of Hawai'i, individuals, and non-profit association of Muslims were likely to succeed on their claim that President exceeded his delegated authority, as required for preliminary injunction to be granted; permitting Proclamation's sweeping exercise of authority effectively would render Act void of requisite intelligible principle delineating general policy to be applied and boundaries of delegated authority. Immigration and Nationality Act § 212, 8 U.S.C.A. § 1182(f); Executive Order 13,769, Jan. 27, 2017, 82 Fed. Reg. 8977, 2017 WL 412752. Hawaii v. Trump, 878 F.3d 662 (9th Cir. 2017).

**[END OF SUPPLEMENT]**



Footnotes

1 La.—State v. Miller, 857 So. 2d 423 (La. 2003).

2 Nev.—N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs, 310 P.3d 583, 129 Nev. Adv. Op. No. 72 (Nev. 2013).

3 U.S.—Colgate-Palmolive-Peet Co. v. National Labor Relations Bd., 338 U.S. 355, 70 S. Ct. 166, 94 L. Ed. 161 (1949); National Federation of Federal Emp., Local 1622 v. Brown, 645 F.2d 1017 (D.C. Cir. 1981).
Mass.—Opinion of the Justices to the Senate, 375 Mass. 827, 376 N.E.2d 1217 (1978).
Utah—Carter v. Lehi City, 2012 UT 2, 269 P.3d 141 (Utah 2012).
Wis.—Sinclair v. Department of Health and Social Services, Division of Family Services, 77 Wis. 2d 322, 253 N.W.2d 245 (1977).
Delegation of legislative powers to administrative agencies, see C.J.S., Public Administrative Law and Procedure §§ 97 et seq.
**Determination of national interest**
Decisions as to what serves "interest" of United States or health, safety, and welfare of its people are best made by Congress alone and not by attorney general and his subordinates.
U.S.—U.S. v. City of Philadelphia, 482 F. Supp. 1248 (E.D. Pa. 1979), judgment aff'd, 644 F.2d 187 (3d Cir. 1980).

4 Wis.—Seider v. O'Connell, 2000 WI 76, 236 Wis. 2d 211, 612 N.W.2d 659 (2000).
**Executive revision of clear statutory terms**
The President's power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration, but it does not include a power to revise clear statutory terms that turn out not to work in practice.
U.S.—Utility Air Regulatory Group v. E.P.A., 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014).

5 Colo.—Vagneur v. City of Aspen, 2013 CO 13, 295 P.3d 493 (Colo. 2013).

6 Utah—Carter v. Lehi City, 2012 UT 2, 269 P.3d 141 (Utah 2012).

7 Ga.—Perdue v. Baker, 277 Ga. 1, 586 S.E.2d 606 (2003).

8 U.S.—Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio L. Abs. 417, 62 Ohio L. Abs. 473, 26 A.L.R.2d 1378 (1952); Sierra Club v. Froehlke, 392 F. Supp. 130 (E.D. Mo. 1975), judgment aff'd, 534 F.2d 1289 (8th Cir. 1976).
Ill.—Inland Real Estate Corp. v. Village of Palatine, 107 Ill. App. 3d 279, 63 Ill. Dec. 234, 437 N.E.2d 883 (1st Dist. 1982).
N.Y.—While You Wait Photo Corp. v. Department of Consumer Affairs of City of New York, 87 A.D.2d 46, 450 N.Y.S.2d 334 (1st Dep't 1982).

9 U.S.—Drinan v. Nixon, 364 F. Supp. 854 (D. Mass. 1973).

10 U.S.—Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio L. Abs. 417, 62 Ohio L. Abs. 473, 26 A.L.R.2d 1378 (1952); Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935); Courtney v. Island Creek Coal Co., 474 F.2d 468 (6th Cir. 1973); Delay v. U.S., 602 F.2d 173 (8th Cir. 1979).
N.H.—Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981).
Tex.—General Elec. Credit Corp. v. Smail, 584 S.W.2d 690 (Tex. 1979).

11 Utah—Carter v. Lehi City, 2012 UT 2, 269 P.3d 141 (Utah 2012).

12 Cal.—Perry v. Brown, 52 Cal. 4th 1116, 134 Cal. Rptr. 3d 499, 265 P.3d 1002 (2011).

13 § 280.

14 U.S.—First Investment Annuity Company of America v. Miller, 446 U.S. 981, 100 S. Ct. 2961, 64 L. Ed. 2d 837 (1980); Colgate-Palmolive-Peet Co. v. National Labor Relations Bd., 338 U.S. 355, 70 S. Ct. 166, 94 L. Ed. 161 (1949); National Audubon Soc., Inc. v. Watt, 678 F.2d 299 (D.C. Cir. 1982).
Colo.—Bonacci v. City of Aurora, 642 P.2d 4 (Colo. 1982).
N.C.—Thigpen v. Ngo, 355 N.C. 198, 558 S.E.2d 162 (2002).
**Statutes of limitation**
Administrative agencies do not possess authority to extend or modify period of limitation prescribed by statute.
Minn.—DeMars v. Robinson King Floors, Inc., 256 N.W.2d 501 (Minn. 1977).
**Suspension of statute not shown**
Statute, which related to bag limits and hunting in closed season, was repealed by legislature, by operation of another statute, when parks and wildlife commission's proclamation became effective, and thus, commission had not suspended statute so as to violate state constitutional provision that no power of suspending laws was to be exercised except by legislature.
Tex.—McDonald v. State, 615 S.W.2d 214 (Tex. Crim. App. 1981).

15 Ariz.—Valencia Energy Co. v. Arizona Dept. of Revenue, 191 Ariz. 565, 959 P.2d 1256 (1998).

16 La.—State v. Broom, 439 So. 2d 357 (La. 1983).

17 N.M.—In re Adjustments to Franchise Fees Required by Electrical Utility Industry Restructuring Act of 1999, 2000-NMSC-035, 129 N.M. 787, 14 P.3d 525 (2000).

18 Cal.—Sharon S. v. Superior Court, 31 Cal. 4th 417, 2 Cal. Rptr. 3d 699, 73 P.3d 554 (2003).

19 Va.—Volkswagen of America, Inc. v. Smit, 266 Va. 444, 587 S.E.2d 526 (2003).

20 Va.—Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 594 S.E.2d 571 (2004).

21 Ariz.—Facilitec, Inc. v. Hibbs, 206 Ariz. 486, 80 P.3d 765 (2003).

22 D.C.—Mitchell v. District of Columbia, 741 A.2d 1049 (D.C. 1999).

23 Del.—State v. Retowski, 36 Del. 330, 175 A. 325 (Gen. Sess. 1934).
Wash.—State v. Miles, 5 Wash. 2d 322, 105 P.2d 51 (1940).

24 La.—State v. Miller, 857 So. 2d 423 (La. 2003).

25 Ga.—Atkins v. Manning, 206 Ga. 219, 56 S.E.2d 260 (1949).
Idaho—In re The Petition of Idaho State Federation of Labor (AFL), 75 Idaho 367, 272 P.2d 707 (1954).

26 U.S.—U.S. v. Carolina Freight Carriers Corporation, 315 U.S. 475, 62 S. Ct. 722, 86 L. Ed. 971 (1942); In re Grand Jury Investigation of Ven-Fuel, 441 F. Supp. 1299 (M.D. Fla. 1977).
Mass.—Opinion of the Justices to the Senate, 375 Mass. 827, 376 N.E.2d 1217 (1978).

27 U.S.—U.S. v. Carolina Freight Carriers Corporation, 315 U.S. 475, 62 S. Ct. 722, 86 L. Ed. 971 (1942).

28 Tenn.—Prescott v. City of Memphis, 154 Tenn. 462, 285 S.W. 587, 48 A.L.R. 1378 (1926).

29 Alaska—O'Callaghan v. State, Director of Elections, 6 P.3d 728 (Alaska 2000).

  

30 Ky.—Atlantic Coast Line R. Co. v. Com., 302 Ky. 36, 193 S.W.2d 749 (1946).
N.Y.—Prince v. Davis, 195 Misc. 901, 87 N.Y.S.2d 600 (N.Y. City Ct. 1949).

31 U.S.—Puerto Rico v. Branstad, 483 U.S. 219, 107 S. Ct. 2802, 97 L. Ed. 2d 187 (1987).

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

**IV. Distribution of Governmental Powers and Functions**

**D. Executive Powers and Functions**

**2. Encroachment on Legislature**

## § 454. Spending public funds

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2621

**Violation of the separation of powers provision of a state constitution occurs when the executive branch, rather than the legislature, determines how, when, and for what purpose public funds shall be applied in carrying on the government.**

Violation of the separation of powers provision of a state constitution occurs when the executive branch, rather than the legislature, determines how, when, and for what purpose public funds shall be applied in carrying on the government.[1] However, a governor has the constitutional prerogative to spend less than the full amount of an appropriation but is not free to withhold funds or otherwise fail to execute the law on the basis of views regarding the social utility or wisdom of the law because a governor may not totally negate a legislative policy decision that lies at the core of the legislative function.[2] Conversely, administrative agencies lack the power to require the legislature to appropriate money.[3] Members of the executive branch do not have the ability to transfer funds from those to whom the General Assembly has appropriated money, where there is no provision in the state constitution allowing such to occur, and moreover, the General Assembly cannot delegate this legislative power even if it so desires.[4]

  

***Insufficient budget.***

If the legislative department fails to appropriate funds deemed sufficient to operate the executive department at a desired level of services, the executive department must serve the citizenry as best it can with what it is given.[5]



Footnotes

1 N.M.—State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768 (1998).
**Executive agency's investment charge**
A public utilities commission's electric program investment charge does not violate the separation of powers doctrine by usurping the legislature's authority over appropriations and taxation.
Cal.—Southern California Edison Company v. Public Utilities Commission, 227 Cal. App. 4th 172, 173 Cal. Rptr. 3d 120 (2d Dist. 2014), as modified, (June 18, 2014).

2 Vt.—Hunter v. State, 177 Vt. 339, 2004 VT 108, 865 A.2d 381 (2004).

3 Cal.—Carmel Valley Fire Protection Dist. v. State, 25 Cal. 4th 287, 105 Cal. Rptr. 2d 636, 20 P.3d 533 (2001).

4 S.C.—State ex rel. Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623, 164 Ed. Law Rep. 930 (2002).

5 Ky.—Fletcher v. Com., 163 S.W.3d 852 (Ky. 2005).

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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

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**D. Executive Powers and Functions**

**2. Encroachment on Legislature**

## § 455. Encroachment on legislature by prosecutor or administrative enforcement officer

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2621
West's Key Number Digest, District and Prosecuting Attorneys 8(4), 8(6)

**The executive power includes prosecutorial discretion, and this discretion includes the power to plea bargain and choose from among numerous legislatively delineated offenses in making charging decisions or bringing administrative enforcement actions.**

The executive power is used to collect evidence and seek an adjudication of guilt in a particular case while, in contrast, it is within the sphere of legislative authority to define crimes and sentences.[1] The prosecution power resides in the executive department,[2] including decisions on whether or not to prosecute a particular defendant,[3] or plea bargain with a criminal defendant.[4] The executive department may assemble and introduce evidence of a crime, within the bounds of the law, even against a member of the legislative branch.[5]

Prosecutorial discretion is rooted in the separation of powers and due process.[6] Therefore, the executive department has discretion over which charges to file[7] and when and to whom immunity from prosecution will be granted.[8] The executive's

  

exclusive authority to decide whether to prosecute, as well as to decide which of several alternative statutory sections a defendant will be charged with violating, does not impinge upon the separation of powers.[9]

Where the finding of a nonstatutory aggravating factor is not a prerequisite to imposing a death sentence, a prosecutor is not "making law" in violation of the separation of powers doctrine by alleging a nonstatutory aggravating factor; the prosecutor's advocacy does not itself criminalize conduct or increase the maximum penalty to which a particular defendant is exposed.[10]

***Administrative enforcement; interpretation of a legislative act.***

The interpretation of a legislative act by an administrative agency charged with its enforcement, though not conclusive, is generally given great weight by a reviewing court although an administrative agency cannot usurp legislative powers or contravene a statute.[11]



Footnotes

1 Minn.—State v. Zais, 790 N.W.2d 853 (Minn. Ct. App. 2010), aff'd, 805 N.W.2d 32 (Minn. 2011).

2 Minn.—State v. Zais, 790 N.W.2d 853 (Minn. Ct. App. 2010), aff'd, 805 N.W.2d 32 (Minn. 2011).

3 U.S.—U.S. ex rel. Reagan v. East Texas Medical Center Regional Healthcare System, 274 F. Supp. 2d 824 (S.D. Tex. 2003), aff'd, 384 F.3d 168 (5th Cir. 2004).
Cal.—Manduley v. Superior Court, 27 Cal. 4th 537, 27 Cal. 4th 887a, 117 Cal. Rptr. 2d 168, 41 P.3d 3 (2002), as modified, (Apr. 17, 2002).
Mass.—Com. v. Clerk-Magistrate of West Roxbury Div. of Dist. Court, 439 Mass. 352, 787 N.E.2d 1032 (2003).

4 Wash.—State v. Rice, 159 Wash. App. 545, 246 P.3d 234, 264 Ed. Law Rep. 400 (Div. 2 2011), aff'd on other grounds, 174 Wash. 2d 884, 279 P.3d 849 (2012).

5 Pa.—Com. v. Feese, 2013 PA Super 255, 79 A.3d 1101 (2013), as corrected, (Jan. 16, 2014).

6 Cal.—Gananian v. Wagstaffe, 199 Cal. App. 4th 1532, 132 Cal. Rptr. 3d 487, 273 Ed. Law Rep. 346 (1st Dist. 2011).

7 Cal.—Manduley v. Superior Court, 27 Cal. 4th 537, 27 Cal. 4th 887a, 117 Cal. Rptr. 2d 168, 41 P.3d 3 (2002), as modified, (Apr. 17, 2002).
Minn.—Johnson v. State, 641 N.W.2d 912 (Minn. 2002).
S.C.—State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999).

8 Pa.—Com. v. Doolin, 2011 PA Super 133, 24 A.3d 998 (2011).

9 N.H.—In re Opinion Of Justices, 162 N.H. 160, 27 A.3d 859 (2011).

10 N.H.—State v. Addison, 165 N.H. 381, 87 A.3d 1 (2013).

11 Ala.—Pleasure Island Ambulatory Surgery Center, LLC v. State Health Planning and Development Agency, 38 So. 3d 739 (Ala. Civ. App. 2008).

# 16 C.J.S. Constitutional Law § 456

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**Constitutional Law**
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**PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers**

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## § 456. Modifying state law or promulgating administrative regulations; policymaking

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2621

**A governor, and his or her executive agencies, lack the authority to change or amend state law since such power falls exclusively to the legislative branch. However, the power to make rules and regulations to carry out the provisions of a statute is not an exclusively legislative power and in some cases may be exercised by executive branch officers.**

A governor lacks the authority to change or amend state law since such power falls exclusively to the legislative branch.[1] Although the power to make rules and regulations[2] carrying out the provisions of a statute is not an exclusively legislative power and is also administrative in nature,[3] the discretion of a legislative body, because of its formal role as a formulator of public policy, is much broader than that of an administrative board.[4] An administrative agency does not have any broad authority to make laws; it only possesses the power to adopt regulations carrying into effect the will of the legislature,[5] and if an administrative rule exceeds the statutory authority established by the legislature, the agency has usurped the legislative function thereby violating the separation of powers.[6] An administrative agency within the executive branch may not under the guise of rule-making engage in basic policy determinations reserved to the legislature,[7] nor may it substitute its judgment for that of the legislature.[8] Executive boards or agencies may be held to have exceeded their legislative authority when they enact

  

laws that do not simply supplement the existing legislation.[9] Thus, an administrative agency should merely fill in the legislative gaps to effectuate the purpose of a legislative act.[10]



Footnotes

1 Fla.—Florida House of Representatives v. Crist, 999 So. 2d 601 (Fla. 2008).

2 Mo.—Missouri Coalition for Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125 (Mo. 1997), as modified on denial of reh'g, (Feb. 25, 1997).

3 U.S.—I.N.S. v. Chadha, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

Pa.—Com. v. Smoker, 177 Pa. Super. 435, 110 A.2d 740 (1955).

Administrative rules and regulations in general, see C.J.S., Public Administrative Law and Procedure §§ 207 et seq.

4 Conn.—MacKenzie v. Planning and Zoning Com'n of Town of Monroe, 146 Conn. App. 406, 77 A.3d 904 (2013).

**Legislature's role to declare policy**

Ohio—Williams v. Spitzer Autoworld Canton, L.L.C., 122 Ohio St. 3d 546, 2009-Ohio-3554, 913 N.E.2d 410, 69 U.C.C. Rep. Serv. 2d 545 (2009).

5 Md.—Bozeman v. Disability Review Bd. of Prince George's County Police Pension Plan, 126 Md. App. 1, 727 A.2d 384 (1999).

6 Ohio—McFee v. Nursing Care Mgt. of Am., Inc., 126 Ohio St. 3d 183, 2010-Ohio-2744, 931 N.E.2d 1069 (2010).

7 Cal.—Gerard v. Orange Coast Memorial Medical Center, 234 Cal. App. 4th 285, 183 Cal. Rptr. 3d 721 (4th Dist. 2015).

N.Y.—Ford v. New York State Racing and Wagering Bd., 24 N.Y.3d 488, 999 N.Y.S.2d 826, 24 N.E.3d 1090 (2014).

8 Kan.—In re Tallgrass Prairie Holdings, LLC, 50 Kan. App. 2d 635, 333 P.3d 899 (2014).

9 N.Y.—New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health and Mental Hygiene, 23 N.Y.3d 681, 992 N.Y.S.2d 480, 16 N.E.3d 538 (2014).

**Where executive branch did not create new rules on a "clean slate"**

A governor's executive order and the state department of health's regulations did not violate the doctrine of separation of powers where the governor and department did not write on a clean slate, creating their own comprehensive set of rules without the benefit of legislative guidance, but rather they merely filled in the details of broad legislation describing overall policies.

N.Y.—Concerned Home Care Providers, Inc. v. New York State Dept. of Health, 45 Misc. 3d 703, 994 N.Y.S.2d 789 (Sup 2014).

10 Or.—Chevron U. S. A., Inc. v. Motor Vehicles Division, 49 Or. App. 1099, 621 P.2d 668 (1980).

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**2. Encroachment on Legislature**

## § 457. Veto power

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2621

**The power to approve or veto bills is a legislative rather than an executive function.**

The power conferred on the chief executive to approve or veto bills passed by the legislature is not strictly an executive but a legislative function.[1] As such, it is limited in its exercise by a constitutional prohibition against an exercise by the executive of powers conferred exclusively on the legislature by the constitution.[2] Thus, a state governor may have the ability, after the legislature passes an appropriation act, to veto items or sections contained within the act.[3]

Under a constitution making no exception to laws which are subject to veto, it has been held that no exception can be made on the theory that a veto may constitute an encroachment on legislative powers.[4]



Footnotes

1 Kan.—State v. French, 133 Kan. 579, 300 P. 1082 (1931).
Neb.—Elmen v. State Bd. of Equalization and Assessment, 120 Neb. 141, 231 N.W. 772 (1930).
2 Neb.—Elmen v. State Bd. of Equalization and Assessment, 120 Neb. 141, 231 N.W. 772 (1930).
3 S.C.—State ex rel. Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623, 164 Ed. Law Rep. 930 (2002).
4 Wash.—State ex rel. Greive v. Martin, 63 Wash. 2d 126, 385 P.2d 846 (1963).

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## § 458. Application of rules; specific instances of encroachment

Topic Summary | References | Correlation Table

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2621

**Under specific circumstances, the executive's actions have been found to encroach upon the legislative branch.**

A decision by a state's secretary of the commonwealth to reject a writ of election to fill the seat of a resigning member of the state legislature violates the separation of powers doctrine by intruding on the power of the legislature to issue a writ for a special election.[1] Moreover, where a governor's actions in entering into a compact with an Indian tribe are of a policymaking nature and thus legislative in character, as the compact involves policy decisions including taxation and licensing issues, the governor also violates the separation of powers doctrine.[2] However, an executive branch local health board's regulation that restricts smoking in enclosed public places and specifies a criminal penalty does not usurp legislative power over the creation of crimes and penalties where the legislature deemed that local health board regulations were enforceable in a criminal proceeding, and the board recited the legislatively defined penalty in its regulation merely to provide notice and did not create a new crime and penalty.[3]

A state governor does not have the power to supervise the legislature's implementation of its constitutional authority to regulate state-run lotteries.[4] Likewise, the overhaul of a state's public assistance system, which was effected by the executive branch

  

through executive action, implemented the type of substantive policy changes reserved to the legislature and thus violated the doctrine of separation of powers.[5] A proposed bill that would give the governor the authority to prevent the appropriation of money from a specific state fund violates the prohibitions against the executive department exercising legislative power.[6] A statute allowing for the withholding of legislators' salaries until passage of an annual state budget does not impermissibly merge or shift the powers between the executive and legislative branches, in violation of the separation of powers doctrine.[7]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Only the people's elected representatives in Congress have the power to write new federal criminal laws, and thus, permitting executive officials to define the scope of criminal law could offend the doctrine of separation of powers. U.S. Const. art. 3, § 1 et seq. Valenzuela Gallardo v. Barr, 968 F.3d 1053 (9th Cir. 2020).

Promulgation of Department of Health (DOH) regulation implementing governor's executive order imposing hard cap limiting administrative costs and executive compensation of health care providers receiving state financial assistance or state-authorized funds reflected balancing of costs and benefits according to preexisting guidelines set by the Legislature, rather than new value judgment directed at resolution of a social problem, so as to support finding that regulations did not violate the separation of powers doctrine; enabling statutes reflected Legislature's policy directive that DOH oversee the efficient expenditure of state health care funds to ensure high-quality services, and hard caps accomplished goal by limiting extent to which state funds were used for non-service-related salaries or disproportionately large administrative budgets. N.Y. Public Health Law §§ 201(1)(o), (p), 206(3); N.Y. Social Services Law § 363-a; N.Y. Comp. Codes R. & Regs. tit. 10, § 1002.1. LeadingAge New York, Inc. v. Shah, 32 N.Y.3d 249, 90 N.Y.S.3d 579, 114 N.E.3d 1032 (2018).

**[END OF SUPPLEMENT]**



Footnotes

1 Pa.—Perzel v. Cortes, 582 Pa. 103, 870 A.2d 759 (2005).

2 N.Y.—Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 766 N.Y.S.2d 654, 798 N.E.2d 1047 (2003).

3 W. Va.—Foundation For Independent Living, Inc. v. The Cabell-Huntington Bd. of Health, 214 W. Va. 818, 591 S.E.2d 744 (2003).

4 R.I.—Almond v. Rhode Island Lottery Com'n, 756 A.2d 186 (R.I. 2000).

5 N.M.—State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768 (1998).

6 Mass.—In re Opinion of the Justices to the Senate, 430 Mass. 1201, 717 N.E.2d 655 (1999).

7 N.Y.—Cohen v. State, 94 N.Y.2d 1, 698 N.Y.S.2d 574, 720 N.E.2d 850 (1999).